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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF MCALESTER, et al.,
Petitioners,

v.

PITTSBURGH COUNTY RURAL WATER DISTRICT NO.7, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit's liberal-construction standard is at odds with standards of construction applied to 7 U.S.C. § 1926(b) by the U.S. Courts of Appeals for the Fourth, Sixth, and Seventh Circuits, and an Oklahoma intermediate appellate court.

2. Whether the Tenth Circuit's standard resolving doubts in favor of federally-indebted water districts in determining territory protected by 7 U.S.C. § 1926(b) violates federal law requiring strict interpretation of federal statutes that provide anticompetitive protection.

3. Whether the Tenth Circuit's standard resolving doubts in favor of federally-indebted water districts in determining territory protected by 7 U.S.C. § 1926(b) violates the text of the statute.

4. Whether the Tenth Circuit's standard resolving doubts in favor of federally-indebted water districts in determining territory protected by 7 U.S.C. § 1926(b) violates congressional intent.

5. Whether the Tenth Circuit adopted a constitutionally doubtful interpretation of 7 U.S.C. § 1926(b) when it announced its standard resolving doubts in favor of federally-indebted water districts in determining territory protected by Section 1926(b), despite the availability of a construction that would avoid such questions.

PARTIES TO THE PROCEEDING

Petitioners

City of McAlester and the McAlester Public Works Authority. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Petitioners have no other corporate affiliations. Generally speaking, singular references to "the Petitioner," "City of McAlester," "City," and "McAlester" are intended to encompass both Petitioners.

Respondents

The primary respondent in this matter is Pittsburg County Rural Water District No. 7, referred to herein as "Pittsburg."

At the district-court level, this action involved a number of "additional defendants," which were identified as co-appellees at the court-of-appeals level. These additional defendants are expected to support this Petition for Writ of Certiorari, but under Rule 12(b) of the Supreme Court Rules would be considered respondents in the proceedings before this Court. The additional respondents to this proceeding are: Kenneth W. Sherrill, Linda F. Sherrill, Bar-19, Blessing Corp., d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis DeFrange, Terry Kinyon, Pittsburg County Regional Exposition Authority, the Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Chairman Bill Webber, Oben Weeks, and Thundercreek Golf Course Trust Authority. In addition, the Oklahoma Municipal League and the National League of Cities were permitted to participate at the court-of-appeals level as amicus curae.

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OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. The Order and Judgment are reported in a table at 211 F.3d 1279, and on Westlaw at 2000 WL 525942. A copy of the Order and Judgment is included in Appendix A, at page 1a. The Court of Appeals' order denying rehearing is unpublished, and is included in Appendix E, at page 54a. The Orders and Judgment by the United States District Court for the Eastern District of Oklahoma are unpublished, although the District Court's November 26, 1997 Order is reported on Westlaw at 1997 WL 835210. The District Court Orders and Judgment are included in Appendix B, at page 17a, in Appendix C, at page 20a, and in Appendix D, at page 34a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its Order and Judgment on May 2, 2000. [Appendix A.] On May 16, 2000, Petitioners filed a timely Combined Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). The United States Court of Appeals for the Tenth Circuit denied the Combined Petition on May 31, 2000. [Appendix E.] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Combined Petition. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 1

The Spending Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * * * * * * * * *

7 U.S.C. § 1926. Water and waste facility loans and grants.[1]

. . .

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

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[1] The full text of 7 U.S.C. § 1926(b) is set forth in Appendix E.

STATEMENT OF THE CASE

This action began in 1997, when Pittsburg filed a complaint asking the U.S. District Court for the Eastern District of Oklahoma to enjoin McAlester's water sales to industrial facilities located in the Taylor Industrial Park ("Park"). [Appendix D, at p. 38a.] McAlester developed the Park in 1981 and has been serving water to Park occupants since that time. [Appendix D, at pp. 36a, 37a.]

Pittsburg requested the injunction based on its claim of an exclusive right to serve water within its geographic territory. [Appendix D, at p. 38a.] The geographic territory was drawn in 1966 when Pittsburg was formed by an order of the Pittsburg County Board of Commissioners. [Appendix D, at p. 36a.] Although the Park has been within Pittsburg's geographic territory for over thirty years, Pittsburg has never provided water service to the Park. [Appendix D, at p. 37a.]

Pittsburg's claim of an exclusive right to serve the Park is based on 7 U.S.C. § 1926(b). [Appendix D, at p. 38a.] Section 1926(b) is part of the Consolidated Farm and Rural Development Act ("CFRDA").[2] Through the Farmers Home Administration ("FmHA"), which is part of the Department of Agriculture, the CFRDA provides direct loans and loan guaranties to rural water associations. These loans are to provide for the "conservation, development, use, and control of water."[3] FmHA loans are typically used by rural water associations for development and improvement of water

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[2] 7 U.S.C. § 1921 *et seq.*

[3] 7 U.S.C. § 1926(a)(1).

systems, including laying water lines to new areas where rural water services are needed.[4]

Section 1926(b) provides anticompetitive protection to public entities that accept federal loans for the construction of water distribution facilities in rural areas. Section 1926(b) prohibits the limitation or curtailment of water service that is provided or made available by the borrower – in this case, Pittsburg. To fall within the prohibition, the limitation or curtailment of water service must be accomplished through "inclusion of the area served ... within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

Pittsburg first borrowed from the federal government under the CFRDA in 1967, receiving a loan of $300,000. [Appendix A, at p. 4a.] On February 24, 1989, Pittsburg repurchased its outstanding debt, and the notes were marked "SATISFIED IN FULL -- FmHA." [Appendix A, at p. 5a.] Pittsburg obtained another loan under the CFRDA on June 15, 1994. [Appendix A, at p. 5a.]

On November 26, 1997, the District Court entered summary judgment in favor of McAlester, holding that Pittsburg had no adequate water lines in place to service the Park, and thus had failed to make water service available to the Park for purposes of Section 1926(b). [Appendix D, at p.

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[4] *See, e.g., Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956 (E.D.N.Y. 1997) (describing usage by a rural water association of CFRDA-borrowed money, initially "to fund [the association's] water system," and later to fund an expansion of the association's water system into a new area).

47a.] The District Court determined that McAlester had shown the absence of any genuine issues of material fact on this issue. [Appendix D, at pp. 40a-41a, 45a-47a.]

On May 2, 2000, the Tenth Circuit reversed the District Court's summary judgment on this issue, on the basis that "the district court applied the wrong standard to determine whether [Pittsburg] made service available to the disputed customers." [Appendix A, at p. 11a.] The Tenth Circuit determined that the District Court had applied the correct test for Section 1926(b) protection – called the "pipes in the ground" test –, but had done so "in an inappropriately restrictive manner." [Appendix A, at p. 11a.]

On August 17, 1999, after the entry of judgment by the District Court in this action, [Appendix B], the Tenth Circuit announced a new liberal-interpretation standard for Section 1926(b). *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000). The *Sequoyah* court held that "[d]bouts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Id.* at 1197.

In the case before this Court on petition for writ of certiorari, the principal error identified by the Tenth Circuit in the District Court's ruling on Section 1926(b) protection for the Park was that the District Court failed to resolve doubts in favor of Pittsburg in applying the "pipes in the ground" test.[5] [Appendix A, at p. 11a.]

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[5] The Tenth Circuit identified other errors by the District Court that are not pertinent to this Petition for Writ of Certiorari. The

ARGUMENT FOR GRANTING WRIT

The Court should grant certiorari in this case because the Tenth Circuit's liberal-construction standard for 7 U.S.C. § 1926(b) is contrary to rules of statutory construction. First, Section 1926(b) is an anticompetitive statute – a safe harbor from federal antitrust scrutiny. Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish and maintain monopolies that otherwise would be prohibited. The Tenth Circuit's liberal-construction standard is contrary to long-standing federal law requiring that exemptions from federal antitrust liability be construed narrowly.

The new standard is also contrary to principles for construction of Section 1926(b) announced and applied by the Fourth, Sixth, and Seventh Circuits and an intermediate appellate court in Oklahoma. *See Bell Arthur Water Corp. v. Greenville Util.* Comm'n, 173 F.3d 517 (4th Cir. 1999); *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996); *CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994); *Westville Util. Auth. v. Bennett*, 903 P.2d 880 (Okla. App. 1995).

Tenth Circuit determined that the District Court should have applied Section 1926(b) protection to Pittsburg's first period of indebtedness, from 1967 through 1989. [Appendix A, at pp. 10a-11a.] Even if the District Court had applied Section 1926(b) protection to the earlier period, the District Court's decision on Pittsburg's Section 1926(b) protection for water sales to the Park would have been determined by its application of the "pipes in the ground" test in the manner determined by the Tenth Circuit to be "inappropriately restrictive."

In applying its new liberal-construction standard to Section 1926(b), the Tenth Circuit has exceeded the scope of the text of the statute, and the congressional power behind the statute. The Tenth Circuit's standard could be used to impose liability on McAlester for water sales to customers within an industrial park developed by McAlester in 1981 – customers that have always received water services from McAlester, on land that Pittsburg has never served with water services. This application of Section 1926(b) is contrary to the express terms of the statute, which prohibit only "curtailment" and "limitation" of water service that is provided or made available by the protected water association. 7 U.S.C. § 1926(b).

Furthermore, with this application of Section 1926(b), the Tenth Circuit has stretched Section 1926(b) beyond the scope of the Spending Clause, which provides the congressional authority for the statute's enactment. States are provided with insufficient notice that acceptance of federal loans under this statute will result in a reshuffling of existing water providers. Under the Tenth Circuit's view of Section 1926(b), the simple occurrence of the funding of a federal loan can operate to divest a municipality of its investment in infrastructure, and oust the municipality from active provision of water services to existing customers.

With this case, the delicate structure of federalism hangs in the balance. If the Tenth Circuit's decision is allowed to stand, rural water associations will be allowed to derail industrial development and disrupt the efforts of well-intentioned, development-minded municipalities. These gross actions by rural water associations will be enabled by a federal statute – 7 U.S.C. § 1926(b) – that was never intended to impede development in rural areas.

ARGUMENT 1

The Tenth Circuit's liberal construction of Section 1926(b) is inconsistent with federal law on the construction of federal statutes that restrain competition.

No federal court has gone as far as the Tenth Circuit in adopting a liberal-construction standard for 7 U.S.C. § 1926(b). In its 1999, the Tenth Circuit held that "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000). This liberal standard was unsupported by existing federal case law. More importantly, the broad standard is inconsistent with longstanding federal law on the construction of federal statutes that restrain competition.

Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish monopolies that otherwise would be prohibited by federal antitrust laws. The Tenth Circuit recognized that Congress intended with Section 1926(b) "to protect rural water districts from competition in order to encourage rural water development." *Muldrow*, 191 F.3d at 1196 (quoting *Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 88 (Colo. 1995). This type of anticompetitive protection is directly contrary to the fundamental national economic policy that is embodied in federal antitrust laws. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

As an exemption from federal antitrust liability, Section 1926(b) must be construed narrowly. The Court has long held that exemptions to antitrust laws are to be construed narrowly. *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983); *Abbott Labs. v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47, *reh'g denied*, 396 U.S. 871 (1969); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956) (Warren, C.J.).

In *McKesson & Robbins*, the Court rejected arguments for a broad construction of the Miller-Tydings and McGuire Acts, which authorized price-fixing agreements under limited circumstances. *McKesson & Robbins*, 351 U.S. at 310-11, 316. The base-line rule – that price-fixing agreements are illegal per se – was established by the Sherman Act. *Id.* at 310. The *McKesson & Robbins* Court properly construed the Sherman Act broadly, and its exemptions narrowly.

Similarly, in *Portland Retail Druggists Association*, the Court held that in enacting the exemption provision of the Nonprofit Institutions Act, the Congress "surely did not intend to give the hospital a blank check." *Portland Retail Druggists Assn.*, 425 U.S. at 13. "We therefore conclude that the exemption provision of the Nonprofit Institutions Act is a limited one; that just because it is a nonprofit hospital that is purchasing pharmaceutical products does not mean that all its purchases are exempt from Robinson-Patman. . . ." *Id.* at 14.

In *Seatrain Lines*, the Court narrowly construed a provision of Section 15 of the Shipping Act, which provided an antitrust exemption for certain agreements filed with the

Federal Maritime Commission. *Seatrain Lines*, 411 U.S. at 726-28, 733. The Court rejected a broad reading of the statute because it

> would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, and that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

Seatrain Lines, 411 U.S. at 733 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)) (citations omitted). In *Philadelphia National Bank*, the Court rejected an argument that the Bank Merger Act, by requiring bank regulatory agencies to consider competitive factors when approving mergers, "immunized approved mergers from challenge under the federal antitrust laws." *Philadelphia Nat'l Bank*, 374 U.S. at 350.

The federal courts applying Section 1926(b) protection cannot ignore the requirement of strict construction of anticompetitive federal statutes. The Court should grant certiorari in this case to address the Tenth Circuit's departure from relevant decisions of this Court.

ARGUMENT 2

An important, although subtle, disagreement exists on the standard for construction of Section 1926(b).

Several courts have construed Section 1926(b) in a limited and restrictive manner – in a manner that is inconsistent with and in fact diametrically opposed to the liberal interpretation standard adopted by the *Muldrow* court. For example, in 1993, the Seventh Circuit placed limits on the scope of Section 1926(b), even while recognizing the prevailing trend that "federal courts construing the statute have ... interpreted it liberally to protect FmHA-indebted rural water associations." *CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 137 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994). Despite the prevailing trend, the Seventh Circuit found limits on the scope of Section 1926(b) protection:

> This is not to say, however, that a government loan to a rural water association can totally freeze retail water utility development within the indebted association's service area. Some development is permissible even though the granting of a franchise or the inclusion of the service area within municipal boundaries are precluded.

CSL Utils., Inc., 16 F.3d at 137.

Another example of the broader view of Section 1926(b) interpretation prior to the Tenth Circuit's announcement of its decision in *Muldrow* can be found in a district court decision, *Rural Water Sys. No. 1 v. Sioux*

Center, 967 F. Supp. 1483 (N.D. Iowa 1997), *rev'd in part*, 202 F.3d 1035 (8th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3774 (June 5, 2000) (Case No. 99-1956). There, the U.S. District Court for the Northern District of Iowa observed that "[t]he purpose of § 1926(b) is not to protect a rural water association at all costs." *Sioux Center*, 967 F. Supp. at 1520. The U.S. Court of Appeals for the Eighth Circuit reversed the *Sioux Center* court in part, following the Tenth Circuit's *Muldrow* standard for interpretation of Section 1926(b). *Rural Water Sys. No. 1. v. Sioux Center*, 202 F.3d 1035, 1038 (8th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3774 (June 5, 2000) (Case No. 99-1956).

Other applications of the more restrictive approach to Section 1926(b) interpretation are more subtle, but just as important. In 1999, the U.S. Court of Appeals for the Fourth Circuit was faced with facts that are similar to those in this case. *Bell Arthur Water Corp. v. Greenville Util. Comm'n*, 173 F.3d 517 (4th Cir. 1999). The *Bell Arthur* court approved of the district court's determination, based on undisputed facts, that the rural water association had inadequate facilities "to provide service to the area within a reasonable time after a request for service is made." *Id.* at 526. Neither the district court nor the Fourth Circuit applied a liberal-construction standard in reviewing the rural water association's claim of Section 1926(b) protection. *Id.*; *Bell Arthur Water Corp. v. Greenville Util. Comm'n*, 972 F. Supp. 951 (E.D.N.C. 1997), *aff'd*, 173 F.3d 517 (4th Cir. 1999). It is clear that McAlester would have received a different result in the Fourth Circuit. The *Bell Arthur* court would have affirmed the summary judgment entered by the U.S. District Court for the Eastern District.

Finally, McAlester would have received a different result had the dispute been filed in state court in Oklahoma,

rather than in the U.S. District Court for the Eastern District of Oklahoma. In 1995, the Oklahoma Court of Appeals[6] rejected a claim of Section 1926(b) protection. *Westville Util. Auth. v. Bennett*, 903 P.2d 880 (Okla. App. 1995). In *Westville*, a rural water association attempted to oust a municipality from its active provision of water services to existing customers. The *Westville* court determined that Section 1926(b) protection did not apply because it requires "an encroachment by the [municipality] into the territory of the Rural Water District. If anything, the reverse is true here making the federal authority inapplicable." *Id.* at 883.

The Court should grant certiorari in this case to resolve the disagreements among courts on the standard for construction of the anticompetitive protection found in 7 U.S.C. § 1926(b).

ARGUMENT 3

The Tenth Circuit's announcement of a liberal-construction standard for Section 1926(b) in its *Muldrow* decision was unsupported by existing federal-court authority.

The current trend of liberal construction of Section 1926(b) has no support in pre-existing federal case law. Despite sweeping statements by the Fifth and Seventh

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[6] The Petitioners respectfully note that the Oklahoma Court of Appeals is an intermediate appellate court in Oklahoma, rather than the state court of last resort as contemplated by Rule 10(a) of the Supreme Court Rules. However, the *Westville* decision is an indication of the likely treatment of Section 1926(b) claims in Oklahoma state courts.

Circuits, the liberal-construction standard applied to Section 1926(b) can be traced to only a handful of decisions, none of which addressed the requirement of strict construction for exemptions from antitrust scrutiny.

In its *Muldrow* decision, the Tenth Circuit relied on decisions from the Fifth and Seventh Circuits in support of its announcement that "[d]oubts ... should be resolved in favor of the FmHA-indebted party seeking protection for its territory." [Appendix A, at p. 9a (citing *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996), and *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989) (hereinafter *Jennings Water II*).] Neither of the cited decisions expressly supports the standard announced by the Tenth Circuit. Furthermore, the liberal-interpretation standard is not as deeply rooted as proclaimed by the Fifth Circuit in *North Alamo*. In fact, the liberal-construction standard finds its source in a misstatement of authority by the Seventh Circuit in *Jennings Water II*.

In *North Alamo*, the Fifth Circuit announced: "Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." *North Alamo*, 90 F.3d at 913. However, the *North Alamo* court finds this conclusion in the Seventh Circuit's decision in *Jennings Water II*.[7] In *Jennings Water II*, the Seventh Circuit proclaims broadly that "[a]ll five federal courts that have reviewed section 1926(b) have

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[7] The *Jennings Water* decision was also the source of a similar statement by the Sixth Circuit in *Wayne v. Sebring*, 36 F.3d 517, 527-28 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995).

concluded that the provision should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment." *Jennings Water II*, 895 F.2d at 315. A review of the authorities cited by the *Jennings Water II* court reveal that this pronouncement by the Seventh Circuit is misleading, and should not serve as support for the liberal-construction standard applied by the Tenth Circuit in *Muldrow*.

First, the *Jennings Water II* court cites *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court does not use the terms "broad application" or "liberal interpretation." Instead, the *Madison* court appears to be the source of the "congressional mandate" phrase that appears in many decisions interpreting Section 1926(b):

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

Madison, 816 F.2d at 1059. A clear mandate and unambiguous statutory terms do not, however, equate with a liberal-interpretation standard.

The *Jennings Water II* court then cites *Moore Bayou Water Assn. v. Jonestown*, 628 F. Supp. 1367, 1369-70 (M.D. Miss. 1986), and argues that the *Moore Bayou* court construed Section 1926(b) as broad and absolute. The *Moore Bayou* court's decision, however, does not use the terms "broad" or "absolute." The *Moore Bayou* court found no ambiguity in the meaning of the statute, and determined that its application would not lead to absurdity. "The section clearly prohibits *any* curtailment or limitation of the service provided by a rural water association resulting from the inclusion of all or a part of its territory within a municipality while the association is indebted to the FmHA." *Moore Bayou*, 628 F. Supp. at 1369-70.

The source of the liberal-construction standard can be found only through an examination of the *Jennings Water II* court's citation of *Glenpool Util. Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). There, the Tenth Circuit cites and quotes the district court decision that is under review by the *Jennings Water II* court. In 1988, the U.S. District Court for the Southern District of Indiana held that "[t]he clear message of the three federal cases applying 7 U.S.C. § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems." *Jennings Water, Inc. v. North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988) (hereinafter *Jennings Water I*), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

The source, therefore, of the liberal-construction standard is a district court decision from 1988. Without considering the longstanding principal of strict interpretation for antitrust exemptions, the district court in *Jennings Water I* determined that the statute should be construed broadly to prevent municipalities from finding loopholes in the statute's coverage. In doing so, however, the *Jennings Water I* court opened the floodgates for subsequent federal courts to impose liability on municipalities far beyond the level expressly contemplated by the Congress that drafted Section 1926(b).

This Court should grant certiorari in order to unravel the tangled web on which the liberal-construction standard of Section 1926(b) is based. The strict-construction standard for antitrust exemptions must be applied to Section 1926(b) in order to prevent undue judicial impediments on competition.

ARGUMENT 4

The Tenth Circuit has stretched Section 1926(b) beyond its text and the intent of Congress by requiring doubts to be resolved against McAlester.

By applying a broad brush to its interpretation of Section 1926(b), the Tenth Circuit has stretched the statute beyond its text, beyond its purpose, and beyond the intent of Congress. With the more limited interpretation of Section 1926(b) applied by the *CSL Utilities* court, discussed *infra*, it is clear that Muldrow would have received a different result had this case been decided in the Seventh Circuit. The *CSL Utilities* court held that Section 1926(b) "prohibit[s] another supplier (whether public or private) from *being substituted for, and from displacing*, the service of the rural water association. . . . The cases and fragments of legislative

history available to us all seem to have in mind curtailment resulting from *substitution* of some third party as a water-supplier for [the disputed customer]." *CSL Utils., Inc.*, 16 F.3d at 135 (emphasis added).

Based on this narrow interpretation of Section 1926(b), applied by the *CSL Utilities* court, McAlester would be allowed to continue its water sales to existing water customers. The *CSL Utilities* court recognized that it is the displacing or supplanting of a rural water association that runs afoul of Section 1926(b). If the municipality initiates water service to undeveloped land, there can be no Section 1926(b) violation for continued water sales to the municipality's water customers. *CSL Utils., Inc.*, 16 F.3d at 133 (holding that the restriction on private franchises found in Section 1926(b) is contingent upon a finding that a private franchise "was granted during the term of the FmHA loan"). On this critical point, the Tenth Circuit's decision is in conflict with the decision of the Seventh Circuit in *CSL Utilities*.

On this same critical point, the Tenth Circuit's decision conflicts with the Sixth Circuit's decision in *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996). The *Lexington-South Elkhorn* court correctly recognized that a rural water association claiming Section 1926(b) protection must "make service available" "prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection." *Lexington-South Elkhorn*, 93 F.3d at 234. The logical extension of this rule is that a municipality may avoid Section 1926(b) liability if it commences water service before the elements of Section 1926(b) are met – before the rural water association (1) makes service available or (2) becomes indebted to the federal government.

The Tenth Circuit chose a more broad view of Section 1926(b) protection. Despite undisputed facts on McAlester's development of vacant land in 1981, its construction of water lines and other infrastructure to serve the area, and its active provision of adequate water services since that time, the Tenth Circuit determined that Pittsburg may still be entitled to Section 1926(b) protection. The Tenth Circuit based this decision on its liberal-construction standard, holding that Pittsburg should receive the benefit of any doubt in the application of Section 1926(b) protection.

This application of Section 1926(b) scrutiny is contrary to the express terms of the statute. Section 1926(b) provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

The operative terms in Section 1926(b) are "curtailed or limited." It is these actions that are prohibited by the statute. The terms are active verbs, and are roughly

synonymous. The term "limit" is defined as "to curtail or reduce in quantity or extent." *Webster's Third New International Dictionary* 1312 (1976 ed.). The term "curtail" is defined as to "reduce in area or amount," or "to diminish." *Id.* at 558.

The statute then uses the terms "inclusion . . . within," and "the granting of" to further define the actions that are proscribed by Section 1926(b). Again, the drafters of the statute used active verbs to define the conduct that is prohibited. The term "inclusion" is defined as "*the act of* including." *Webster's Third New International Dictionary* 1143 (1976 ed.) (emphasis added). In turn, the verb "to include" means "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle." *Id.* The term "granting," or "to grant," means "GIVE, BESTOW, CONFER . . . to make a conveyance of: give the possession or title of *esp.* by a deed or formal writing." *Id.* at 989.

The federal courts that have interpreted Section 1926(b) have summarized these proscribed actions with the term "encroachment." *See, e.g., North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir. 1996) (using the term "encroachment"), *cert. denied*, 519 U.S. 1029 (1996). The term "encroachment" is defined as "the act or action of encroaching." *Webster's Third New International Dictionary* 747 (1976 ed.). The verb "to encroach" is then defined to mean "to enter by gradual steps or by stealth into the possessions or rights of another: TRESPASS, INTRUDE." *Id.*

Each of these terms encompasses an active violation of Section 1926(b), rather than a passive violation. For example, the Fifth Circuit has equated "encroachment" with

"competing franchises, new or additional permit requirements, or similar means." *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court read Section 1926(b) expansively to also prohibit a condemnation action by a municipality. *Id.* The difference between the condemnation action contemplated by the *Madison* court and the preexisting water service in the case before this Court is that a condemnation action is a positive action taken by a competitor, seeking to take existing customers and revenue from the protected rural water association. In a similar view of the active component of the conduct prohibited by Section 1926(b), the Seventh Circuit viewed the term "encroachment" as the *expansion* of water sales "to consumers located within the rural water association's territory." *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989).

To run afoul of Section 1926(b), a municipality must actively compete for the disputed water customer, by moving into the disputed territory through *inclusion* of the territory within its corporate boundaries. It is in this sense that the Tenth Circuit improperly applied Section 1926(b).

Entirely absent from the clear and express terms of Section 1926(b) is a prohibition on the *continuation* of water sales by a municipality to an existing water customer. Also absent from the terms of Section 1926(b) is any indication that Congress intended for Section 1926(b) protection to be used to prevent a municipality from continuing water sales to an existing customer. Nowhere in the text of Section 1926(b) does Congress explain that a municipality may lose control of its infrastructure – its capital expenditures – simply because a federal loan has been extended to a neighboring rural water association.

Looking beyond the express terms of the statute,[8] Section 1926(b) must be interpreted consistently with the federal power on which it is based. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981) ("In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate ...."). In this case, the retrospective imposition of Section 1926(b) liability on municipalities for the continuation of water service to existing water customers is inconsistent with the federal Spending Clause power.[9]

In fact, the Tenth Circuit's application of Section 1926(b) – if it were consistent with congressional intent – is precisely the type of misapplication of the Spending Clause

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[8] To the extent that Section 1926(b) is ambiguous in its terms, it should not be interpreted to limit fundamental state legislative prerogatives, such as the provision of water service by municipalities. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991). Such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere." *Id.* at 460, 461. "Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* at 460.

[9] In 1988, the Tenth Circuit held that Section 1926(b) "is most appropriately viewed as a congressional enactment resting upon Congress' powers under the spending clause of the United States Constitution." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988) (footnote omitted), *cert. denied*, 490 U.S. 1067 (1989). No federal court has held otherwise, *see Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1061 (5th Cir. 1987), and the Petitioners respectfully agree with the *Glenpool* court, that spending power analysis is appropriate for Section 1926(b).

power that "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1677 (1999) (Kennedy, dissenting).

Importantly, it is the application of Section 1926(b) by the Tenth Circuit, in direct contradiction of the clear and express terms of the statute, that runs afoul of the limits of Spending Clause power. The prevention of active encroachment on water service "made available" by a federally-indebted rural water association arguably may fall within the congressional spending power. However, the framers could never have intended the Spending Clause to authorize Congress to forcibly remove a municipality from active water service to an existing customer. That is what the Tenth Circuit has done with its application of Section 1926(b).

This broad application of Section 1926(b) is rendered more damaging to the balance of the federal system by the fact that a private right of action has been attached to violations of Section 1926(b). "[D]efining the scope of the private cause of action in general, and the damages remedy in particular, 'inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken.'" *Davis*, 526 U.S. 629, 119 S. Ct. at 1677-78 (Kennedy, dissenting). "[T]his element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Id.* at 1678 (Kennedy, dissenting).

The "clear notice" requirement is not met in this case. First, in enacting Section 1926(b), Congress failed to express clearly an intent to impose a restriction on competition of the magnitude contemplated by the Tenth Circuit. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). This is the type of "massive obligation" that "defies common sense." *Id.* As demonstrated above, the clear and express terms of the statute militate against the retrospective application adopted by the Tenth Circuit. Application of Section 1926(b) to existing water customers is precisely the type of "post acceptance or 'retroactive' conditio[n]" that the Court rejected in *Pennhurst*. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). The Tenth Circuit has expanded the anticompetitive protection of Section 1926(b) from a preventative statute – restraining expansion of municipal water systems – to a coercive statute, forcing a municipal water system to give up existing customers and the attendant capital expenditures.

Second, the State of Oklahoma never had an opportunity to choose not to accept the funds that were borrowed by Pittsburg in 1967 or 1994. Congress failed to state the conditions that the Tenth Circuit found in Section 1926(b) with sufficient clarity. The State's potential obligations under Section 1926(b) are largely indeterminate, *see Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981), particularly in view of the retrospective application adopted by the Tenth Circuit. Acceptance of the funds under the conditions imposed by the Tenth Circuit would allow Pittsburg to oust McAlester as water-service provider to customers that have been adequately served by McAlester since 1981. [Appendix D, at pp. 36a, 37a.] Because this eventuality was not clear from the text of Section 1926(b), the State was unable to make an informed choice regarding whether to accept the benefits of the federal loans

contemplated by Section 1926. Given such an opportunity, the State would certainly have elected not to accept the funds.

Furthermore, in determining the scope of Section 1926(b), the Court must consider the ongoing nature of the federal loans extended under 7 U.S.C. § 1926. Once the federal loans are funded, the states lack the ready ability to unravel the resulting obligations. Even if state legislatures were to remove water associations' power to borrow from the federal government,[10] existing federal loans would remain outstanding for indeterminable periods.[11] "Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance." *Guardians Assn. v. Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983) (White, J., separate opinion).

As a final indication of the absence of congressional intent supporting the Tenth Circuit's broad interpretation of

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[10] *See Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215-16 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

[11] In an effort to remedy the imbalance created by the Tenth Circuit's broad application of Section 1926(b), state legislatures may be tempted to dismantle the statutes creating rural water associations. This result certainly would be inconsistent with the stated purpose of Section 1926(b), which is to "serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

Section 1926(b), the imposition of Section 1926(b) liability under these circumstances would offend constitutional due process. In drafting 1926(b), Congress must have understood the statute to have conformed with the requirements of due process. In this case, the Tenth Circuit's application of Section 1926(b) has effected an unconstitutional taking of infrastructure and capital investment – and the rights to serve specific customers – owned by McAlester.

McAlester developed the Park in 1981. As part of its development, McAlester constructed water lines and other infrastructure to encourage private industrial development within the Park. Many years later, in 1997, Pittsburg filed suit to oust McAlester from serving water to the private industries that occupied the Park. Under the Tenth Circuit's view, Pittsburg would be entitled to assert such protection and receive the benefit of any doubt on whether it could have provided water service to the Park. By applying Section 1926(b) in this manner, the Tenth Circuit has authorized the appropriation of the property of McAlester without "just compensation." The Fifth Amendment protects the property of states from appropriation by the federal government without just compensation. *See United States v. Carmack*, 329 U.S. 230, 242 (1946), *reh'g denied*, 329 U.S. 834 (1947); *California v. United States*, 395 F.2d 261, 263 & n.4 (9th Cir. 1968). "This is true even when the property has been dedicated by the State to public use." *California*, 395 F.2d at 264 & n.5.

When viewed in light of the requirements of Due Process, the Tenth Circuit's broad interpretation of Section 1926(b) is inconsistent with the clear terms of the statute. Had Congress intended to effect a "taking" of municipally-owned water-service infrastructure as part of the funding of federal loans to rural water associations, it would have

included a provision to compensate the municipality that is forced to give up its infrastructure. In the absence of such a congressional intent, the Court can only conclude that the drafters of Section 1926(b) did not intend to supplant municipalities as water service providers under such circumstances.

Regardless of the source of congressional intent – the text of the statute, the limits of the spending power, or the constraints of due process – the Tenth Circuit's expansive interpretation of Section 1926(b) exceeded the statute's intended scope. In this case, the delicate balance of federalism has been interrupted by the Tenth Circuit's overly broad application of Section 1926(b). For these reasons, the Court should grant certiorari to address the proper interpretation of 7 U.S.C. § 1926(b).

CONCLUSION

It is only by granting certiorari in this case that the Court can put an end to litigation abuse based on 7 U.S.C. § 1926(b). By clarifying the standard for interpretation of this statute, and by explaining the remedies available under this statute, this Court can right the disturbed balance of federalism at its lowest level.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 2, 2000]

No. 98-7148
(D.Ct. No. 97-CV- 185-B)

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma, *Plaintiff-Appellant,*	)
v.	)
CITY OF MCALESTER, a municipality; THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust; KENNETH W. SHERILL; LINDA F. SHERILL; CITY OF MCALESTER; BAR-19; BLESSINGS CORP., d/b/a Edison Plastics; MIG, INC.; SOUTH-WEST OKLAHOMA BOX COMPANY; TRI-CAT, INC.; SIMMONS POULTRY FARMS, INC.; DENNIS DEFRANGE; TERRY KINYON; PITTSBURG	)

COUNTY REGIONAL
EXPOSITION AUTHORITY;)
PITTSBURG COUNTY BOARD)
OF COMMISSIONERS, a/k/a)
Board of County Commissioners of)
Pittsburg County, Oklahoma;)
H.G. GILLIAM; BILL WEBBER;)
OBEN WEEKS; THUNDER-)
CREEK GOLF COURSE TRUST)
AUTHORITY,)
Defendants-Appellees.)
)
OKLAHOMA MUNICIPAL)
LEAGUE; NATIONAL LEAGUE)
OF CITIES,)
Amici Curiae.)
)

ORDER AND JUDGMENT*

Before **BALDOCK** and **BRORBY**, Circuit Judges, and **REAVLEY**,** Senior Circuit Judge.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

Plaintiff-Appellant Pittsburg County Rural Water District No. 7 (District) appeals the district court's entry of summary judgment in favor of Defendants-Appellees City of McAlester, Oklahoma, and McAlester Public Works Authority, a public trust (City).[1] The District brought this action under 42 U.S.C. § 1983, claiming the City violated the District's exclusive right, obtained pursuant to 7 U.S.C. § 1926(b), to provide water to customers within its service area. The District also sought declaratory and injunctive relief in relation to: (1) the City's sale of water to the District; (2) the City's sale of water to the District's claimed customers; and (3) the County Commissioners' efforts to deannex portions of the disputed area from the District's territory. Finally, the District brought several related state claims and sought various damages for past and future violations of § 1926(b). We exercise jurisdiction under 28 U.S.C. § 1291 and reverse.

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[1] The suit contains multiple additional defendants, best described as the District's potential customers who wish to receive their water from the City. The Board of County Commissioners of the County of Pittsburg is also a defendant. Unless specifically identified, we will refer to the defendants collectively as "the City." In addition, we note the Oklahoma Municipal League, in conjunction with the National League of Cities, filed an Amicus Curiae brief supporting the City. We have considered the thoughtful, reasoned arguments therein, but choose not to address them directly here. *See Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 n.1 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000).

BACKGROUND

The facts of this case are remarkably similar to those of our recent case, *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192 (10th Cir. 1999), *cert. denied,* 120 S. Ct. 1532, 120 S. Ct. 1548 (2000). In this case, the Board of County Commissioners of Pittsburg County, Oklahoma, incorporated the District on April 26, 1966 to "develop[] and provid[e] an adequate rural water supply . . . to serve and meet the needs of rural residents within the territory of the district."[2] Okla. Stat. Ann. tit. 82, § 1324.3. In order to help rural water districts carry out that mission, Oklahoma law authorizes districts to borrow money from the federal government. *See* Okla. Stat. Ann. tit. 82, § 1324.10(A)(4). In turn, the federal government makes loans available to districts pursuant to 7 U.S.C. § 1926(a).

The District first took advantage of these federal loans, administered by the Farmer's Home Administration (FmHA),[3] in 1967 by borrowing $300,000. The District remained continuously indebted to FmHA until February 24, 1989, when the District borrowed funds from the First National Bank and Trust Co. of McAlester, Oklahoma, in order to

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[2] The parties agree all the areas involved in this dispute fall within the District's territory.

[3] The water loan program is now administered by the Rural Utilities Service, however we will continue to refer to FmHA throughout this order and judgment.

repurchase its outstanding debt to FmHA.[4] Subsequent to repurchase, the notes were marked "SATISFIED IN FULL - FmHA." The District is once again indebted to FmHA pursuant to a loan obtained on June 15, 1994.

Periods of indebtedness are important because § 1926(b) protects rural water districts indebted to FmHA from competition or other encroachments in their service area:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

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[4] At this point, the District was indebted to FmHA on two notes, with principle balances of $237,661.73 and $227,789.21 respectively. The repurchase occurred at a discounted rate pursuant to a government debt buy-back program designed to reduce the federal deficit. *See Sequoyah,* 191 F.3d at 1195, 1198.

7 U.S.C. § 1926(b). Congress included this language "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." S. Rep. No. 87-566, *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309. This provision not only encourages rural water development, but also provides the federal government greater security in its loans. *See Sequoyah,* 191 F.3d at 1196. In order to receive the protection of § 1926(b), "a water association must (1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area." *Id.* at 1197. Therefore, our analysis necessarily hinges on determining whether the City began providing water to customers in the District's territory while the District was indebted to FmHA, and if so, whether the District "made service available" to those customers at that time.

Based on the dates of the District's various loans, the disputed customers can be split into three camps: (1) those the City first served during the original period of the District's indebtedness, July 3, 1967 to February 24, 1989; (2) those first served between February 24, 1989 and June 15, 1994; and (3) those first served after June 15, 1994, when the District incurred its latest debt to FmHA. While this dispute includes several smaller properties, the bulk of the suit involves the individual businesses inhabiting an industrial park outside McAlester. The parties agree the City began providing water to at least one industrial park resident - Edison Plastics - during the first time period. The City extended service to two additional businesses during the second period: Southern Star (Simmons Foods) and Tri-Cat.

Finally, at least five businesses were added as City customers after June 15, 1994: Southeastern Oklahoma Box, Central Garden, BAR-19 Foods, Vision Manufacturing, LLC (Hawk Boats), and Quality Fishing, Inc.

Recognizing these stipulations, the district court granted the City's summary judgment motion, denied the District's competing summary judgment motion, and granted various motions to dismiss via two separate orders issued November 26, 1997 and September 30, 1998. The district court's decisions, while dealing with a plethora of issues, focused on the two remaining elements the District needed to prove in order to qualify for § 1926(b) protection: the District's indebtedness to FmHA, and the District's ability to make service available to the customers in question.

The district court first examined the impact of the District's repurchase of its debt in 1989 and determined any protections afforded the District under § 1926(b) were extinguished at that time along with its indebtedness to FmHA. Because the District became indebted to FmHA again in 1994, the district court decided the only actionable claims at issue were based on actions taken by the City after June 15, 1994. The court then turned to the issue of whether the District had made service available, and found the District had not done so because it did not have a line in proximity to the disputed areas "capable of delivering water in sufficient quantities to service the disputed territory." In addition, the court based its decision on the District's assertion it will require individual customers to pay for any line extensions needed to provide service. Based on these findings, the

district court determined the District did not qualify for the protections of § 1926(b).[5]

DISCUSSION

> We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

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[5] To further complicate matters, during the pendency of the current suit the Pittsburg County Board of Commissioners ordered the deannexation of the entire industrial park, as well as other disputed areas, from the District's territory. This action raises an important issue yet to be addressed by the courts: Does § 1926(b) preempt local decisions, made by the state government entity empowered to create a water district's original service area, to reduce the district's service area? The district court did not reach this issue because of its finding the District did not meet the requirements of § 1926(b). Thus, this is the first of several questions we will not reach here, but which may need to be addressed by the district court on remand.

Simms v. Oklahoma ex. rel. Dep't of Mental Health & Substance Abuse Serv., 165 F.3d 1321, 1326 (10th Cir.) (further internal citations and quotation marks omitted), *cert. denied*, 120 S. Ct. 53 (1999). When reviewing cross-motions for summary judgment, "our review of the record requires that we construe all inferences in favor of the party against whom the motion under consideration is made," in this case the District. *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996).

I. 7 U.S.C. § 1926(b) Claim

The district court entered its orders in this case without the benefit of our recent *Sequoyah* decision, and both parties agreed at oral argument *Sequoyah* is dispositive of many of the issues before us in this appeal. Therefore, we will resist the temptation to exhaustively repeat the thorough analysis put forth in that opinion and keep our discussion brief.

As in *Sequoyah*, the parties here disagree about the effect of the District's repurchase of its debt from FmHA. The District argues the repurchase had no effect, that they were continuously indebted to FmHA from the time of the first loan in 1967, and therefore they satisfy the first requirement of § 1926(b) protection for the entire period in question. The City responds by defending the district court's ruling that the repurchase extinguished the District's debt to FmHA, and therefore the District cannot bring claims for actions taken by the City prior to June 15, 1994, when the

District again became indebted to FmHA.[6] We rejected both arguments in Sequoyah.

The District's position is flawed because it fails to recognize the significance of the repurchase of the notes. Section 1926(b) protection "does not extend . . . to issuer repurchases when the underlying debt to the government is simultaneously canceled or retired." *Sequoyah,* 191 F.3d at 1200. The District's debt was discharged in this case as evidenced by the "SATISFIED IN FULL" marks on the notes. *See id.* Therefore, the District was not indebted to FmHA from February 24, 1989, the date of the repurchase, to June 15, 1994, the date of the most recent loan, and cannot claim § 1926(b) protection for this time period.

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[6] While the City agrees with the district court that actions taken prior to June 15, 1994 cannot be included under the protections of § 1926(b), the City finds fault with the district court's determination of the scope of actionable conduct after this date. The City argues the only actionable events under § 1926(b) are the establishment of lines and initial provision of water to a customer. Therefore, § 1926 protection is unavailable to the District for any customer added prior to June 15, 1994. The district court disagreed, finding the City could violate § 1926 by continuing to provide water to a protected area after June 15, 1994, even if the initial service began prior to the period of indebtedness. We refuse to address the City's argument because the district court's ultimate decision the District does not qualify for § 1926 protection was based on other grounds, and the City failed to raise this issue in a cross-appeal. *See* cross-appeal discussion, *infra.*

While the District's position ignores the impact of the repurchase, the City and the district court totally disregard the first period of indebtedness. Adopting this approach "would defeat the purpose of [§ 1926(b)] because a water association which repurchased . . . its debt but which otherwise met the statutory requirements would have no recourse for encroachments that occurred or began while it was indebted to the government. Such a rule clearly would defy the language of § 1926(b)." *Id.* Because the district court determined the repurchase extinguished the District's § 1926(b) protection for the preceding period of indebtedness, we must reverse and remand for further proceedings consistent with *Sequoyah* and this order and judgment.

We must also reverse and remand because the district court applied the wrong standard to determine whether the District made service available to the disputed customers. We have stated the "made service available" requirement of § 1926(b) "should focus primarily on whether the water association has in fact 'made service available,' i.e., on whether the association has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Id.* at 1203. In making this inquiry, we have emphasized "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Id.* at 1197. While the district court correctly chose to apply the "pipes in the ground" test, it did so in an inappropriately restrictive manner.

The court stated the "pipes in the ground" test required more than a line in place proximate to the disputed

area, but also required "that line [] be capable of delivering water in sufficient quantities to service the disputed territory." The court went on to hold that "[g]iven the fact that [the District] does not have adequate lines in place to service the [industrial park], this Court finds that it has not made service available as that term is intended under § 1926(b)." We agree the adequacy of the District's facilities, or its "capacity to provide water service to a given customer," is an important aspect of the "pipes in the ground" test. *Id.* at 1203. However, the district court seems to have limited its examination to the District's ability to provide service today, when "a water association meets the 'pipes-in-the-ground' test by demonstrating 'that it has adequate facilities within or adjacent to the area to provide service to the area *within a reasonable time* after a request for service is made.'" *Id.* (quoting *Bell Arthur Water Corp. v. Greenville Util. Comm'n,* 173 F.3d 517, 526 (4th Cir. 1999)) (emphasis added). The District provided a sworn affidavit from an expert who stated the time (ranging from 0 to 90 days) it would take for the District to install the appropriate facilities for the various disputed customers. At the very least, the district court must address the reasonableness of the time estimates on remand. We note the evidence may present genuine issues of material

fact, thus rendering a summary disposition inappropriate.[7] *See id.* at 1203-06.

II. Injunctive Relief

In its First Amended Complaint, the District stated it acquires all of its water from the City, and claimed the City threatened to stop these sales. The District also claimed it could not obtain a sufficient water supply to meet its customers' needs from other sources. The District argued the City's termination of water sales, if carried out, would violate federal antitrust statutes, and thus sought injunctive relief to

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[7] We also note the district court, in determining the District has not made service available to the disputed areas in its September 30, 1998 Order, seems to emphasize the fact the District will require the disputed customers to pay for some facility improvements in order to provide service. While certainly a relevant factor for determining the District's ability to provide service in a reasonable time, requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, nor is it *per se* unreasonable. *See North Alamo Water Supply Corp. v. City of San Juan,* 90 F.3d 910, 919 n.36 (5th Cir.) (noting general practice in Texas of developers incurring original cost of installing at least a portion of new water system), *cert. denied,* 519 U.S. 1029 (1996); *Glenpool Util. Serv. Auth. v. Creek County Rural Water Dist.*, 956 F.2d 277, 1992 WL 37327 at *1 & n.3 (10th Cir. 1992) (unpublished decision) (city and water district both had policy requiring developer to pay costs of water lines and dedicate the lines to respective water provider). This is obviously an area in need of further factual development on remand.

prevent such termination. The district court rejected this argument, stating the Local Government Antitrust Act of 1984, specifically 15 U.S.C. § 35,[8] excludes cities from civil liability under federal antitrust laws. The court's statement is accurate, as far as it goes; however, it was error to conclude 15 U.S.C. § 35 shields municipalities from claims for injunctive relief. *See Thatcher Enter. v. Cache County Corp.*, 902 F.2d 1472, 1477 (10th Cir. 1990) (§ 35 "does not preclude declaratory or injunctive relief."). *See also Cohn v. Bond,* 953 F.2d 154, 158 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230 (1992); *Sandcrest Outpatient Serv., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1142 (4th Cir. 1988); *Montauk-Caribbean Airways, Inc. v. Hope,* 784 F.2d 91, 95 (2d Cir.), *cert. denied,* 479 U.S. 872 (1986). While the court briefly discussed the parameters of the closely related doctrine of state action immunity, which could provide an alternative ground for denying the District's claims, its decision rested solely on this misinterpretation of § 35. Therefore, the district court must also reexamine the injunction issue on remand, with a focus on whether the City qualifies for state action immunity under the unique facts of this case.

The district court did not reach several issues, most notably whether the county commissioners' deannexation orders are preempted by § 1926(b), because the court

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[8] The text of 15 U.S.C. § 35 provides, in relevant part: "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity."

determined the District did not qualify for § 1926(b) protection. While we agree with the district court's observation that "federal preemption may preclude the use of the state statute providing for deannexation so long as the [District] qualifies for the protections of § 1926(b)," we decline the District's invitation to decide this and other issues, including what remedy, if any, is appropriate. These issues are best left to the district court to consider in the first instance.[9]

In addition, we note in its reply brief the City takes issue with several district court rulings dealing with statute of limitations issues and the availability of § 1983 relief under the facts of this case. We have not considered these arguments because "a party may not attack a decision with a view toward enlarging his or her own rights or lessening the rights of an adversary absent a cross appeal." *Hansen v. Director, OWCP,* 984 F.2d 364, 367 (10th Cir. 1993). *See Lombardi v. SBA,* 889 F.2d 959, 962 (10th Cir. 1989) (statute of limitations question not properly before court when appellees did not raise issue on cross-appeal).

Accordingly, we **REVERSE** the district court's Orders and **REMAND** for further proceedings consistent with this Order and Judgment.

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[9] The district court also declined to exercise supplemental jurisdiction over the various state law claims after making its determination the District lost on the federal claims. The district court may wish to revisit that decision and reach the merits of the state law claims depending on how the case develops on remand.

Entered by the Court:

WADE BRORBY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed October 15, 1998]

No. CIV-97-185-B

PITTSBURG COUNTY RURAL WATER DISTRICT NO 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff,

v.

CITY OF McALESTER, a municipality; and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust,
Defendants,

and

KENNETH W. SHERILL; LINDA F. SHERILL; CITY OF McALESTER; BAR-19; BLESSING CORP. d/b/a EDISON PLASTICS; MIG, INC.; SOUTHWEST OKLAHOMA BOX CO.; TRI-CAT, INC.; SIMMONS

POULTRY FARMS, INC.;)
DENNIS DEFRANGE; TERRY)
KINYON; PITTSBURG COUNTY)
REGIONAL EXPOSITION)
AUTHORITY; THE BOARD OF)
COUNTY COMMISSIONERS OF)
THE COUNTY OF PITTSBURG;)
H. G. GILLIAM; BILL WEBBER;)
OBEN WEEKS; and THUNDER-)
CREEK GOLF COURSE AND)
TRUST AUTHORITY,)
Additional Defendants.)
)

JUDGMENT

Upon consideration of the various motions for summary judgment filed by Defendants and Additional Defendants identified herein above, this Court by separate orders entered November 26, 1997 and September 30, 1998 granted summary judgment as requested in the motions.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the named Defendants and Additional Defendants and against Plaintiff Pittsburg County Rural Water District No. 7, an agency and legally constituted authority of the State of Oklahoma. Accordingly, in accordance with the orders entered by this Court, all claims in this case are hereby **DISMISSED**.

IT IS SO ORDERED this 15th day of October, 1998.

/s/_____
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed September 30, 1998]

No. CIV-97-185-B

PITTSBURG COUNTY RURAL WATER DISTRICT NO 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff,

v.

CITY OF McALESTER, a municipality; and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust,
Defendants,

and

KENNETH W. SHERILL; LINDA F. SHERILL; CITY OF McALESTER; BAR-19; BLESSING CORP. d/b/a EDISON PLASTICS; MIG, INC.; SOUTHWEST OKLAHOMA BOX CO.; TRI-CAT, INC.; SIMMONS

POULTRY FARMS, INC.;)
DENNIS DEFRANGE; TERRY)
KINYON; PITTSBURG COUNTY)
REGIONAL EXPOSITION)
AUTHORITY; THE BOARD OF)
COUNTY COMMISSIONERS OF)
THE COUNTY OF PITTSBURG;)
H. G. GILLIAM; BILL WEBBER;)
OBEN WEEKS; and THUNDER-)
CREEK GOLF COURSE AND)
TRUST AUTHORITY,)
Additional Defendants.)
)

ORDER

In consideration of the discussions at a further Pretrial Conference conducted in this case, this Court directed by Order entered December 3, 1997 that the Plaintiff and Defendants, whose claims had not already been adjudicated by prior Order of the Court, to file requests for summary

judgment.[1] As a result, the following Motions come before this Court for determination:

1) Additional Defendant Simmons Poultry Farms, Inc.'s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 1, 1997 (Docket Entry #168);

2) Thundercreek Golf Course Trust Authority's Motion to Dismiss or in the Alternative, Motion for Summary Judgment filed December 8, 1997 (Docket Entry #170);

3) Motion for Summary Judgment of Additional Defendants Blessing Corp. d/b/a Edison Plastics, Tri-Cat, Inc., Dennis DeFrange, and Terry Kinyon filed December 15, 1997 (Docket Entry #172) and Supplemental Motion for Summary Judgment of Additional

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[1] Specifically, the Order of December 3, 1997 resulting from the further Pretrial Conference permitted the parties to file summary judgment motions regarding (1) whether Plaintiff is entitled to §1926(b) protection in relation to the areas identified at the Conference as the Thundercreek Golf Course, Fender residence, Fairgrounds, and Sherill property; and (2) whether Plaintiff may challenge the deannexation of property from its territory if it does not enjoy §1926(b) [protection] in relation to that property. Further, Defendant Board of County Commissioners of Pittsburg County was permitted to address the issue of whether the act of deannexation triggers §1926(b) or the act thereafter of servicing the deannexed area.

Defendants Blessing Corp. d/b/a Edison Plastics, Tri-Cat, Inc., Dennis DeFrange, Terry Kinyon, Bar-19 Foods, Inc., and Southeast Oklahoma Box Company, L.L.C. filed December 24, 1997 (Docket Entry #188);

4) Plaintiff's Motion for Partial Summary Judgment Relating to the Remaining Areas in Dispute filed December 16, 1997 (Docket Entry #174);

5) Motion of Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Bill Webber and Oben Weeks for Partial Summary Judgment filed December 16, 1997 (Docket Entry #177);

6) Additional Defendants Kenneth W. Sherrill and Linda F. Sherrill's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #179);

7) Additional Defendant Pittsburg County Regional Exposition Authority's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #180);

8) Additional Defendant Mig, Inc.'s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #181).

Amicus curiae briefs were filed on the issues before the Court by the Oklahoma Rural Water Association. Additionally, briefs on the issue of preemption were filed by Defendant Simmons Poultry Farms, Inc. and City of McAlester and the McAlester Public Works Authority. Timely responses and timely replies were filed to the various motions and briefs on preemption. Upon review and consideration of all of these pleadings, this Court renders the ruling reflected herein.

Little benefit will be conferred to the resolution of the remaining issues of this case by repeating the foundational facts of this case. Consequently, this Court incorporates by reference the factual discussions as well as the legal reasoning and authorities contained in the Order entered in this case on November 26, 1997. Additional facts will only be included in the discussion in this Order when they have not already been referenced in the prior Order.

Essentially, the November 26, 1997 Order disposed of the issues regarding the §1926(b) protections which Plaintiff Pittsburg County Rural Water District No. 7 ("Pitt-7") claimed in relation to the Taylor Industrial Park which is located on property owned by Defendant City of McAlester (the "City") and the McAlester Public Works Authority. The set of additional motions under consideration in this Order pertain to other customers in relation to which Pitt-7 claims it is entitled to the protections afforded by §1926(b).

By way of setting the standard by which this Court will determine whether Pitt-7 is entitled to §1926(b) protection as to each customer addressed, the elements necessary for the imposition of this protection remain as they

were set forth in the November 26, 1997 Order. Pitt-7 bears the burden of showing: (1) it is an "association" within the meaning of §1926(b); (2) it has a continuing indebtedness to the FmHA; and (3) the City has encroached upon or invaded an area to which Pitt-7 has "made service available." Lexington-South Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230, 234 (6th Cir. 1996). Pitt-7 is an "association" qualified for §1926(b) protection and remains indebted to the FmHA, thus satisfying the first two elements. On the third element, the key component in determining whether a district has "made service available" is the proximity of existing facilities to the disputed territory, otherwise known as the "pipes-in-the-ground" test. Id. at 237. Specifically, this test is described by the Sixth Circuit in the following terms:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time and allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.
>
> Id.

An association must also demonstrate that the lines in place are capable of delivering water in sufficient quantities to service the disputed area and that it has sufficient financial wherewithal to sustain the physical structures necessary to

accommodate the customers' needs. See, Bell Arthur Water Corp. v. Greenville Utilities Comm., 972 F.Supp. 951, 962-63 (E.D. N.C. 1997).

In its pending Motion for Partial Summary Judgment, Pitt-7 reiterates the arguments made in its prior Motion which were adequately addressed by this Court and that ground need not be retread. The central question now before this Court on the remaining Motions is whether Pitt-7 has made service available to each of the identified entities. Pitt-7 raises the legal argument once again that it can satisfy the "made service available" element by demonstrating it had a legal obligation to provide service to an area. Again, this Court rejects the theory that Pitt-7 was legally obligated to provide service pursuant to Okla. Stat. tit. 82 §1324.12 and relies upon the reasoning set forth in the November 26, 1997 Order. Having thus limited the scope of review, this Court will address the factual circumstances surrounding whether Pitt-7 has made service available to each individual customer in turn.[2]

1. The Sherrill Property[3]

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[2] To the extent that Pitt-7 makes reference to facts and argument pertaining to service to the Taylor Industrial Park, this Court's November 26, 1997 Order addressed all such arguments and no additional comment or modification to that ruling will be made in this Order. These references by Pitt-7 are superfluous to the issues which were to have been addressed in the additional motions.

[3] In large measure, this Court derives the information on the status of service to each identified customer from the affidavit of Glenn R. Jones, a member of the Board of Directors of Pitt-7

Pitt-7's original 6" water line-constructed in 1967 dissects the Sherrill property and, in the past, supplied water to the property. However, the owner of the property has announced plans for a residential development on the Sherrill property. Neither party disputes that the future water needs of this new development will exceed the current capacity in place. Pitt-7 proposes extending a 12" line for a distance of approximately 600 feet. Sherrill would be required to pay for this extension at a estimated cost of $24,200.00.[4]

2. The Fender Residence

A pipeline was laid under Highway 31 off of the same 6" line originally constructed by Pitt-7 in 1967 to service the Fender residence. Sometime in 1984-85, the Fender residence was disconnected from the Pitt-7 line and was connected to the City's line. The City has supplied water to the Fender residence since that time. Pitt-7 states that it can service the property with the line it currently has in place. However, Pitt-7's engineer states that the owner of the Fender residence would be required to run a 1" line from the edge of his property to the home for approximately 200 feet at a cost of $1,000.00, unless an existing line is serviceable.

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and the affidavit of Michael R. Spear, professional engineer, attached as exh. 2 and 3, respectively, to the Exhibits to Brief in Support of Plaintiff's Motion for Partial Summary Judgment Relating to the Remaining Areas in Dispute filed December 16, 1997.

[4] Pitt-7 states that while the City currently does not supply water to the Sherrill property, an actual case or controversy exists as to which entity is entitled to provide service to the property.

3. The Exposition Authority (Fairgrounds) Property

The 6" line constructed in 1967 also runs along the west side of the Exposition Authority Property. The line was placed on property adjacent to the Exposition Authority Property. In order to meet the needs of the property, additional lines are needed at a construction cost of between $206,000.00 and $160,000.00, depending upon the route and connections of the line. These costs would also be bore by the customer.

4. Thundercreek Golf Course

Pitt-7 also constructed an additional 6" line in 1967 which ran from a connection with the City to the Northwest "toward" the Thundercreek Golf Course. In 1982, the line was extended with a 2" line to the property now occupied by the Thundercreek Golf Course. Pitt-7 states that it has provided all of the customer's needs to date. However, in order to service the clubhouse to the Golf Course, the City would have to either sell the meter in place, allow another meter to be placed on its line, each at a cost of $1,000.00 or

construct a 2" line from Pitt-7's current line to the clubhouse at a cost to the customer of approximately $15,000.00.[5]

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the initial burden of showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or

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[5] In regard to the Thundercreek Golf Course property and the Fender residence, the City contends that it began providing service to these properties during a time that Pitt-7 was not indebted to FmHA. Therefore, the City concludes that Pitt-7 is not entitled to §1926(b) protection in regard to either property. Because a dispute in the facts exists as to when the alleged encroachment occurred, this Court cannot rely upon this contention as a basis for summary judgment.

denials of the pleadings, which demonstrates that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

With respect to the facts relevant to this Court's determination as to whether Pitt-7 is entitled to reap the benefits of §1926(b) protection, generally, and whether Pitt-7 made service available to the areas in contention, specifically, this Court finds no dispute in the material facts that would preclude summary judgment. Consequently, resolution of the pending motion turns on which party is entitled to judgment as a matter of law.

From a review of the facts together with this Court's interpretation of the pertinent case authority on §1926(b), this Court must conclude that Pitt-7 has not made service available to the properties in question. The mere fact that Pitt-7 has, in place, water lines in proximity to the properties does not mean that Pitt-7 has per se made service available. Lexington-South Elkhorn, 93 F.3d at 237. Pitt-7 must also demonstrate that the lines in place are of sufficient capacity to handle the water needs of the customers to be served at the present time, depending upon the use of the property. With each property referenced, Pitt-7 will require the customer to pay for an extension to its existing water lines in order to provide service, while requiring the City to discontinue service and leaving the customers without water. This fact, in conjunction with the insufficiency of service now in place, leads this Court to the conclusion that Pitt-7 has not made service available to the disputed areas and is, therefore, not

entitled to §1926(b) protection.[6] Since Pitt-7 is not entitled to §1926(b) protection in regard to the designated properties, Pitt-7's injunctive relief is not appropriate.

Pitt-7 has also claimed that an encroachment occurred through the deannexation of certain properties by the Board of County Commissioners of Pittsburg County (the "Board"). However, in its Response to Supplemental Brief of McAlester on the Issue of Preemption, Pitt-7 admits that, if it is not afforded §1926(b) protection on any given property, preemption does not apply. Since this Court has found that Pitt-7 is not entitled to the aforementioned protection in regard to any of the property at issue, the deannexation procedure in which the Board engaged is not preempted by federal law. Since the majority of Defendants who seek summary judgment are only named in this action because they have been a party to efforts to deannex property from Pitt-7's territory, the claims against them should be dismissed. Pitt-7's claims that the Board did not conduct the deannexation in conformity with the procedures outlined under Oklahoma law is a state law claim over which this Court declines to exercise supplemental jurisdiction, given

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[6] Pitt-7 makes much of the City's "tender" of customers, other than those located in the Taylor Industrial Park, to Pitt-7 to provide water service, contending that this is an admission of a §1926(b) violation. This Court will not attempt to discern the motives of the parties in any actions taken in this case. This case has resulted in protracted negotiations and bantering between the parties and only those facts that are not in dispute or subject to characterization are appropriate for consideration on a summary judgment request.

that all federal claims have been or will be dismissed in this case. 28 U.S.C. §1367(c) (3).[7]

IT IS THEREFORE ORDERED that Additional Defendant Simmons Poultry Farms, Inc.'s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 1, 1997 (Docket Entry #168); Thundercreek Golf Course Trust Authority's Motion to Dismiss or in the Alternative, Motion for Summary Judgment filed December 8, 1997 (Docket Entry #170); Motion for Summary Judgment of Additional Defendants Blessing Corp. d/b/a Edison Plastics, Tri-Cat, Inc., Dennis DeFrange, and Terry Kinyon filed December 15, 1997 (Docket Entry #172) and Supplemental Motion for Summary Judgment of Additional Defendants Blessing Corp. d/b/a Edison Plastics, Tri-Cat, Inc., Dennis DeFrange, Terry Kinyon, Bar-19 Foods, Inc., and Southeast Oklahoma Box Company, L.L.C. filed

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[7] On September 25, 1998, the City filed a Supplemental Brief. Attached to the Brief is a copy of an opinion from the Oklahoma Court of Appeals, entered September 8, 1998 wherein the court determined that the district court's dismissal of Pitt-7's suit challenging the Board's deannexation order releasing certain lands from Pitt-7's territory should be affirmed. The court found that Pitt-7 had not appealed the decision of the Board in a timely fashion and, consequently, the "decision is final and binding on the water district even if based on an erroneous application of federal law." While Pitt-7 has not been afforded an opportunity to respond to this development and, thus, this ruling will not form the basis of this Court's decision, it appears that the dismissal of Pitt-7's challenge to the Board's decision makes that decision binding and unassailable.

December 24, 1997 (Docket Entry #188); Motion of Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Bill Webber and Oben Weeks for Partial Summary Judgment filed December 16, 1997 (Docket Entry #177); Additional Defendants Kenneth W. Sherrill and Linda F. Sherrill's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #179); Additional Defendant Pittsburg County Regional Exposition Authority's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #180); Additional Defendant Mig, Inc.'s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed December 16, 1997 (Docket Entry #181) are hereby **GRANTED**. Accordingly, all federal claims against Defendants and Additional Defendants are hereby **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment Relating to the Remaining Areas in Dispute filed December 16, 1997 (Docket #174) is hereby **DENIED**.

IT IS SO ORDERED this 30th day of September, 1998.

/s/_____
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed November 26, 1997]

No. CIV-97-185-B

PITTSBURG COUNTY RURAL WATER DISTRICT NO 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff,

v.

CITY OF McALESTER, a municipality; and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust,
Defendants,

and

KENNETH W. SHERILL; LINDA F. SHERILL; CITY OF McALESTER; BAR-19; BLESSING CORP. d/b/a EDISON PLASTICS; MIG, INC.; SOUTHWEST OKLAHOMA BOX CO.; TRI-CAT, INC.; SIMMONS

POULTRY FARMS, INC.;)
DENNIS DEFRANGE; TERRY)
KINYON; PITTSBURG COUNTY)
REGIONAL EXPOSITION)
AUTHORITY; THE BOARD OF)
COUNTY COMMISSIONERS OF)
THE COUNTY OF PITTSBURG;)
H. G. GILLIAM; BILL WEBBER;)
OBEN WEEKS; and THUNDER-)
CREEK GOLF COURSE AND)
TRUST AUTHORITY,)
Additional Defendants.)
)

ORDER

This matter comes before the Court on the following pleadings:

1) Motion for Partial Summary Judgment of City of McAlester and the McAlester Public Works Authority filed June 27, 1997 (Docket Entry #67) with Amended Brief in Support thereof filed July 21, 1997 (Docket Entry #96) and Appendix of Exhibits in Support of the Motion filed June 30, 1997 (Docket Entry #73); Plaintiff's Response to McAlester's Motion filed August 4, 1997 (Docket Entry #110) with Exhibits in Support thereof (Docket Entry #111); Defendants' Reply to the Response filed September 2, 1997 (Docket Entry #121) with Appendix of Exhibits thereto (Docket Entry #122); and Defendants' Supplement to Amended Brief in Support of Motion filed October 20, 1997 (Docket Entry #131).

2) Plaintiff's Motion for Partial Summary Judgment filed May 5, 1997 (Docket Entry #15) with Brief in Support thereof (Docket Entry #16); the Joint Brief of City of McAlester and the McAlester Public Works Authority in Opposition to the Motion filed June 27, 1997 (Docket Entry #69); Plaintiff's Reply to the Response filed August 4, 1997 (Docket Entry #109); and Plaintiff's Supplement to the Motion filed November 12, 1997 (Docket Entry #150).

3) Motion to Dismiss of Defendants City of McAlester and the McAlester Public Works Authority filed June 27, 1997 (Docket Entry #68) and Plaintiff's Objection thereto filed August 4, 1997 (Docket Entry #108).

4) Motion to Dismiss of Additional Defendants Blessing Corp.; Tri Cat, Inc.; Dennis Defrange; and Terry Kinyon filed August 6, 1997 (Docket Entry #112); Plaintiff's Response thereto filed August 14, 1997 (Docket Entry #115); and Additional Defendants' Reply filed August 25, 1997 (Docket Entry #117).

Pittsburg County Rural Water District No. 7 ("Pitt-7") was established under Oklahoma law by the Pittsburg County Board of County Commissioners in 1966 for the purpose of providing water service to a designated territory. This territory included the land now occupied by the Taylor Industrial Park (the "Park") in McAlester, Oklahoma. The Park is located on real property owned by the City of McAlester (the "City")[1] and developed for industry in 1981.

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[1] The City of McAlester and the McAlester Public Works Authority will be referred herein collectively since the parties do

When it decided to develop the Park, the City installed a 12 inch water line to service the industry moving into the Park and has been servicing the customers in the Park since its establishment.[2] Although Pitt-7 provides service to other areas surrounding the Park, it does not provide service to the Park itself. To service these areas, Pitt-7 purchases its water from the City through a line to which Pitt-7 is connected. If Pitt-7 were to service the Park, it would purchase the water from the City. Pitt-7 possesses a six inch water line in proximity to the Park. The volume demands for water of the customers in the Park cannot be satisfied through Pitt-7's existing six inch line.[3]

On July 3, 1967, Pitt-7 originally became indebted to the FmHA for $300,000.00 for a term of 40 years for the

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not specifically delineate the separate roles that these two Defendants played in the events forming the basis of this action.

[2] Although not relevant to this Court's determination in this Order, the parties disagree as to whether Pitt-7 was provided the opportunity to "participate" in providing water service to the Park.

[3] See, Affidavit of Michael R. Spear, professional engineer, Exh. 21 to the Exhibits to Plaintiff's Response to McAlester's Motion for partial Summary Judgment filed August 4, 1997; Transcript of Hearing on Motion by Plaintiff for Preliminary Injunction, Exh. A to Appendix of Exhibits to Defendants City of McAlester and McAlester Public Works Authority's Brief in Reply to Plaintiff's Response to Motion for Partial Summary Judgment filed September 2, 1997, p. 65, 11. 4-7.

purpose of constructing its pipelines and facilities. Through the years, Pitt-7 obtained other financing from FmHA. However, on February 24, 1989, Pitt-7 took advantage of a "buy-out" program Congressionally mandated upon the FmHA whereby it borrowed funds from the First National Bank and Trust Co. of McAlester, Oklahoma and extinguished the debt to the FmHA in its entirety. The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried upon Pitt-7's financial records. Thereafter, on June 15, 1994, Pitt-7 obtained another loan from the FmHA and that obligation remains unsatisfied to date. After this loan was obtained, the City continued to provide water service to the Park and added customers as they established their businesses in the Park.

Pitt-7 commenced this action on March 26, 1997 and amended its complaint on June 2, 1997, to allege violations of 7 U.S.C. §1926(b) as enforced through 42 U.S.C. §1983 and an impermissible invasion of its service area. Pitt-7 also alleged violations of various Oklahoma state laws for fixing high water rates, breach of contact, acting contrary to public policy, and breach of good faith. Pitt-7 alleges violations of federal antitrust laws by the City. Pitt-7's claims against those designated as the Additional Defendants relate exclusively to the attempt to deannex the Park from Pitt-7's service territory. Pitt-7 seeks declaratory, injunctive and monetary relief.

While this action was pending, landowners in the Park, including the City and some of the Additional Defendants named in this action, petitioned Defendant Board of County Commissioners of Pittsburg County, Oklahoma (the "Board") to deannex the Park from the territory

designated for service by Pitt-7. On June 27, 1997, the Board released certain property from the territory of Pitt-7 designated for the Pittsburg County Regional Exposition Authority. On July 7, 1997, the Board released the property on which the Park is located from Pitt-7's service area and tabled all other requests for a period of thirty days.

On June 17, 1997, this Court conducted an evidentiary hearing to consider whether a preliminary injunction should issue. Pitt-7 urged this Court to, *inter alia,* prevent the deannexation of its territory by the Board and stop the City's ongoing water service to the Park. After considering the evidence and the rather involved legal arguments and authorities presented by the parties, this Court denied Pitt-7's request for a preliminary injunction, effectively maintaining the status quo until the numerous legal issues could be determined.

Through its pending Motion, the City contends that Pitt-7's claims should be dismissed on the following bases: (1) as a political subdivision, Pitt-7 cannot challenge the actions of another political subdivision through the vehicle of §1983; (2) Pitt-7 did not file its §1983 claim until 16 years after development of the Park by the City and therefore its claims are barred by the applicable two year statute of limitations; (3) the Park has been removed by the Board from the Pitt-7 area and therefore the City's actions in providing service to the Park cannot be considered an encroachment upon Pitt-7's territory; (4) the City has surrendered all other customers it had previously served within Pitt-7's territory except for the Park; (5) Pitt-7's actions violate the Tenth

Amendment to the United States Constitution[4]; (6) §1926(b) only protects Pitt-7's territory while it was indebted to the federal government and since that indebtedness was satisfied, the protections no longer exist; (7) Pitt-7 has failed to meet the requirements of 1926(b) because it cannot make sufficient water available to meet the needs of the Park's customers; and (8) Pitt-7's anti-trust claim fails because the City is protected by the doctrine of state-action immunity. By separate Motion, the City also requests dismissal of Pitt-7's state law claims since all federal claims should be dismissed and this Court should decline exercising supplemental jurisdiction.

For its part, Pitt-7 disputes the City's legal conclusions on the issues raised in the Motion. Further, through its own request for summary judgment, Pitt-7 seeks a favorable judgment on its §1983/§1926(b) claim.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the initial burden of showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-

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[4] This argument surrounding a violation of the Tenth Amendment was subsequently withdrawn by the City and thus will not be address further.

moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

After reviewing the respective statements of the facts which the parties have proffered with their pleadings, this Court concludes that no dispute exists as to the facts which are material to the issues raised by the Motions. Consequently, the sole issue remaining for determination in this Order is whether either party is entitled to judgment as a matter of law, addressing each of the legal issues in turn.

The primary issue in this case surrounds whether Pitt-7 enjoys the statutory protections afforded under 7 U.S.C. §1926(b) which is part of the Consolidated Farm and Rural Development Act (the "Act"). Section 1926(b) provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

> private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Thus, the protections of the territories of rural water districts become effective when the district in question qualifies as an "association" as that term is intended in the legislation, that the district has a continuing indebtedness to the FmHA, and that the City has encroached upon or invaded an area to which Pitt-7 "made service available." Through §1926(b), the Act was enacted to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington-South Elkhorn Water Dist. v. City of Wilmore, Kentucky, 93 F.3d 230, 233 (6th Cir, 1996).

As preliminary matters, the City challenges Pitt-7's use of §1983 on three fronts: (1) Pitt-7 as a political subdivision cannot sue the City, also a political subdivision under §1983; (2) §1983 is not intended to protect the rights conferred by §1926(b); and (3) Pitt-7's claim under §1983 is barred by the applicable statute of limitations. It is apparent from the terms of §1926(b) that it does not contain an enforcement provision should its protections be violated and certainly does not authorize a private right of action to insure compliance. As a result, the courts addressing the issue have found that enforcement of §1926(b)'s protections lies in

§ 1983 since §1926(b) itself does not provide for an exclusive remedy for the violation of its terms. Rural Water System #1. v. City of Sioux Center, 967 F.Supp, 1483, 1503-05 (N.D. Iowa 1997). As stated in the Sioux Center case, the claim remains one for a violation of the terms of §1926(b) and not a violation of §1983. Section 1983 is merely a vehicle through which §1926(b) is judicially enforced. Id. at 1504. Consequently, Pitt-7 has employed the correct statutory foundation for its claims under §1926(b). Similarly, the City's contention that Pitt-7's claim asserted through §1983 should be barred since it is brought between two political subdivisions is without merit. Again, the violation asserted is not of §1983 but rather of §1926(b) and therefore the case authority cited by the City on this issue is distinguishable and inapposite to the rather unique circumstance presented by this case.

Additionally, Pitt-7 has commenced this action in a timely fashion. Since §1983 itself contains no statute of limitations, it is borrowed from each state's personal injury statutes. In Oklahoma, the appropriate statute of limitations is two years. Okla. Stat, tit. 12 § 95. The City argues that since the building of the original lines and the commencement of service to the Park occurred more than 16 years ago, Pitt-7 has not commenced its action within the applicable statute of limitations. In so arguing, the City ignores the recognized exception to the statute of limitations known as the "continuing violations" doctrine. Under this theory, if a continuing violation of a federal law actionable under §1983 is proven, the statute of limitations runs from the last occurrence of wrongful conduct. Sioux Center, 967 F.Supp. at 1508 citing Varner v. National Super Mis., Inc., 94 F.3d 1209, 1214 (8th Cir. 1996). In this case, Pitt-7 has alleged

that the violation of §1926(b) as enforced through §1983 occurs so long as the City continues to supply water service to the Park. If Pitt-7 is entitled to the protections of §1926(b), the City is indeed violating the territorial area established for Pitt-7 to serve. Since it is admitted in this case that the City continues to supply water to the Park, a "continuing violation" is occurring which would extend the statute of limitations and make this action timely, if Pitt-7 is entitled to and the City is violating §1926 (b)'s protections.

This Court next addresses whether Pitt-7 has established the elements necessary to confer §1926(b) protections to it. The City does not contend that Pitt-7 is not an "association" qualified for §1926(b) protections. Thus, this element is deemed satisfied. Next, Pitt-7 must prove that it has been continuously indebted to the FmHA during all times relevant to this action. In this regard, Pitt-7's arguments are flawed. As related in the facts set forth herein above, Pitt-7 took advantage of a buy out program sponsored by the FmHA in 1989 and was no longer indebted to the federal government. At that point in time, any protections enjoyed by Pitt-7 under §1926(b) ceased and no action taken by the City prior to that tame is actionable in this case. Cases addressing this same issue have found similarly. See, Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40-41 (6th Cir. 1996); Bell Arthur Water Corp., v. Greenville Utilities Comm., 972 F.Supp. 951, 957-58 (E.D. N.C. 1997); Sioux Center, 967 F.Supp. at 1523. However, this does not end the analysis because Pitt-7 became indebted to the FmHA once again in 1994. While the City attempts to maintain that only the events of establishing the lines and initial service to the Park are the only actionable events, its arguments in this regard are not persuasive.

Continuing to provide service to a protected area may also form the basis for a violation of §1926(b) since it may represent an encroachment upon a protected territory. Consequently, while Pitt-7's claims prior to 1994 are no longer actionable, those arising after 1994 remain viable.

With some claims remaining in this action, this Court turns the third required element under §1926(b) that Pitt-7 have made service available to the Park. Nothing in the Act defines the terms "service provided" or service "made available." As a result, this Court will look to the various case authorities which discuss these terms. In the case of North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), the court determined that a state law duty to provide service "is the legal equivalent to" making service available under §1926(b). In this case, Pitt-7 contends that it has a duty to provide service to its designated territory under Okla. Stat. tit. 82 § 1324.12 which provides for the establishment and subscription of benefit units. The water district provides for a specified number of benefit units and each landowner in the territory subscribes to a number of units. The section outlines the logistics for this process and the benefits which flow therefrom. Conspicuously absent from this statute is any obligation or duty on the part of the district to provide service. Pitt-7 has failed to provide this Court with any compelling authority which establishes any such duty. Therefore, absent a state law duty, alternative tests for determining whether Pitt-7 made service available must be employed.

An association covered by §1926(b) may also make service available by demonstrating that it has a legal right to serve a particular area coupled with a physical ability to do

so, otherwise designated as the "pipes-in-the-ground" test. Sioux Center, 967 F.Supp. at 1525-26. This test turns on the proximity of existing facilities to the disputed territory. Lexington-South, 93 F.3d at 237. In this case, the City has not argued that Pitt-7 lacked the legal right to provide service to the Park.[5] Also, Pitt-7 had an existing six inch line running adjacent to the Park which is insufficient to service the water needs of the customers in the Park. However, simply possessing facilities near or within the proximity of the area in dispute cannot be sufficient to end the inquiry. If the quality of the lines and the ability of those existing lines to adequately service the disputed area are not also crucial to establishing whether an association makes service available, an absurd result can easily be contemplated. An association could merely demonstrate that it has in place a line of an obviously insufficient capacity and still be afforded the protection of §1926(b). In the meantime while the association may or may not build its lines to accommodate the demands of the disputed territory, the customers are left with inadequate water service to maintain their businesses with no assurance that adequate service will be restored. This Court must conclude that not only must a line be in place, but also that line must be capable of delivering water in sufficient quantities to service the disputed territory. This position is not without precedent. In the Bell Arthur case, the court

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[5] The City does challenge the contention that Pitt-7 possessed the legal right to provide service after the Board deannexed the Park. However, clearly, Pitt-7 did have the legal right under Oklahoma law and the Board's orders establishing its service territory to provide service to the Park prior to the deannexation.

found that the association in that case had a six inch line in place which was insufficient to meet the needs of the areas to be serviced. The court concluded that the association could not provide an improved line within a reasonable time. The association was found to not have made service available. Id. at 962-63.

Also, in the Sioux Center case, the court found that a dispute existed in the facts surrounding the nature of the line in place. At issue was whether the association's line was a "transmission" line or a "service" line. Thus, the quality of the line became determinative as to whether the association in that case enjoyed the protections of §1926(b).

Given the fact that Pitt-7 does not have adequate lines in place to service the Park, this court finds that it has not made service available as that term is intended under §1926(b). Pitt-7's argument that it should be permitted to take over the City's lines currently servicing the Park is specifically rejected. Pitt-7 relies upon the North Alamo case in support of its position. In North Alamo, the court found that the association should be permitted to take over the lines in place with compensation to the municipality for the cost of putting the lines in place. Quite simply, no legal foundation or authority exists for the position espoused in the North Alamo case in this regard. The Fifth Circuit in affirming the core holding in the district court's opinion found that the district court was empowered with broad discretion to fashion a remedy under Rule 54(c) of the Federal Rules of Civil Procedure. This Court declines to repeat such a drastic and draconian remedy in this case. To do so would endorse

Pitt-7's inaction in enforcing its asserted rights to service the Park, which this Court is loathe to do.[6]

This Court also rejects Pitt-7's claim that the City may be held liable for violating federal antitrust laws in its perceived threat to discontinue supplying water to Pitt-7. The City claims that it enjoys immunity for its actions associated with supplying water. The state-action immunity exemption to civil antitrust liability was originally established in the case of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) but has been refined and explained through later precedent. "Generally, a state's anticompetitive actions are immune from civil antitrust laws." Buckley Construction, Inc. v. Shawnee Civic & Cultural Development Authority, 933 F.2d 853, 855 (10th Cir, 1991). In order for a municipality such as the City in this case to enjoy the same immunity, it "must demonstrate its anticompetitive activities 'were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service."'" Id. citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 24 (1985) (additional citation omitted).

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[6] In light of this Court's findings on the merits of the Section 1926(b) claim, the arguments proffered by the City in relation to whether the deannexation of the Park removed it from Section 1926(b) protection and whether the tendering of all other customers within Pitt-7's territory except for the Park has any bearing upon Section 1926(b) protection are rendered moot and will not be addressed in this Order.

However, should a municipality engage in an activity to be proprietary in nature rather than governmental, it cannot reap the benefits of Parker state-action immunity unless it can be shown that the municipality acted to further a state policy. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). This Court need not address whether the City acted as a sovereign or as an entity merely engaged in a business activity since by subsequent legislation, Congress excluded governmental entities, including cities, from civil liability under federal antitrust laws. Specifically, the Local Government Antitrust Act of 1984 provided at 15 U.S.C. §35, in pertinent part:

> **(a) Prohibition in general**. No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C, 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Consequently, Pitt-7 may not pursue any of the civil remedies under the federal antitrust laws since the City falls within the definition of a "local government." 15 U.S.C. §34(1)(A).

Pitt-7 also contends that the City cannot discriminate in providing service under Oklahoma law as a "public business", citing Okla. Stat. tit. 79 § 4. However, Pitt-7 has only asserted a claim for violation of federal antitrust law in this action. Whether the City may or may not be in violation of Oklahoma law should it actually terminate the sale of water to Pitt-7 is left to another day and another lawsuit when and if it ripens into a justiciable claim.

The only remaining claim based in federal law is the request by Pitt-7 that the City and the Additional Defendants be enjoined from taking further action on the pending deannexation petitions, declaratory relief finding the orders already entered by the Board are null and void and/or damages resulting from the deannexation.[7] The City's Motion on this issue essentially raises the deannexation of the Park as a defense to Pitt-7's §1926(b) claim, asserting that since the Park was removed from Pitt-7's territory by application of state law, it cannot be considered an "encroachment" or "curtailment," prohibited by §1926(b). The City contends that in seeking deannexation, it was acting as a landowner in the Park and not as a competitor to Pitt-7.

Pitt-7 responds that the deannexation from its territory violates public policy. Additionally, Pitt-7 contends that the state statute allowing landowners to deannex property from its territory is preempted by the federal protection afforded by §1926(b). Even if the City, Additional Defendants and the Board could pursue the procedure for deannexation under Okla, Stat. tit. 82 § 1324.21, Pitt-7 asserts that the Board were improperly granted because the resultant deannexation was not in the best interest of Pitt-7 as required by the Oklahoma statute.

This Court is not willing to draw the fine distinction between the two roles the City urges. It would appear that deannexation represents precisely the type of curtailment of water service and reduction of income of Pitt-7 which 1926(b)

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[7] See, Pretrial Conference Order filed November 12, 1997 at pp, 3-4.

was intended to prevent. Consequently, federal preemption may preclude the use of the state statute providing for deannexation so long as the association qualifies for the protections of §1926(b), which this Court has previously discussed in this Order. See, e.g. Sioux Center, 967 F.Supp. at 1528-29. However, before this issue can be addressed, this Court is concerned with a more fundamental problem. Since this Court has found that Pitt-7 is not entitled to the protections of §1926(b) in relation to the Park, it follows that it may not now challenge the deannexation of the Park from its territory. The parties have not addressed this issue in any of the pleadings coming before this Court and therefore a further Pretrial Conference shall be conducted to discuss whether the deannexation claim is now academic.

Through their pending Motion to Dismiss, Additional Defendants Blessing Corporation, Tri Cat, Inc., Dennis Defrange, and Terry Kinyon (collectively referred to as "Movant Additional Defendants") assert that the claims against them should be dismissed pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure because: (1) Pitt-7 may not obtain injunctive relief against the Movant Additional Defendants since they do not have the power to deannex, to which Pitt-7's claim is addressed; (2) even if Pitt-7 could seek injunctive relief against the Movant Additional Defendants, they were statutorily authorized to file the petition seeking deannexation with the Board; and (3) injunctive relief inappropriate to correct a wrong which has allegedly already occurred. The Movant Additional Defendants also adopt the arguments of the City in its summary judgment request.

For its part, Pitt-7 counters that the Additional Defendants were joined in this action because they claim an

interest in requesting deannexation and having the Board grant that request. Thus, Pitt-7 argues that the Additional Defendants are necessary parties to this action for both injunctive and declaratory relief. Again, since the deannexation claim may now be moot as a result of this Court's other rulings in this Order, this Court will address this issue at the forthcoming Pretrial Conference as well.

The remaining claims in this action are the various state law claims. Should the final federal claim be dismissed us moot, this Court will decline to exercise supplemental jurisdiction as urged by the City in its Motion to Dismiss. 28 U.S.C. §1367(c)(3). However, should the deannexation claim remain, these state law claims will continue to be viable in this Court.

Finally, this Court is faced with the daunting problem that insufficient pleadings have been filed by the Additional Defendants, with the exception of Additional Defendants Blessing Corporation, Tri-Cat, Inc., Dennis Defrange, and Terry Kinyon, to permit a final ruling on the claims against them, even if this Court should dismiss all claims against the Movant Additional Defendants and the City. Without a vehicle to address the merits of the claims against them, the Additional Defendants that have not filed Motions will remain in the action. This issue will also be addressed at the further Pretrial Conference.

IT IS THERE FORE ORDERED that the Motion for Partial Summary Judgment filed by Defendants City of McAlester and the McAlester Public Works Authority filed June 27, 1997 (Docket Entry #67) is hereby **GRANTED**, in that Pitt-7 is not entitled to the protections of 7 U.S.C.

§1926(b) in relation to the Park. Accordingly, Pitt-7's §1926(b) claim as asserted through §1983 is hereby **DISMISSED**. Due to this ruling, Pitt-7's Motion for Partial Summary Judgment filed May 5, 1997 (Docket Entry #15) is hereby **DENIED**, since it only relates to the §1983 claim.

IT IS FURTHER ORDERED that the Motion to Dismiss filed by City of McAlester and McAlester Public Works Authority on June 27, 1997 (Docket Entry #68) is hereby **DENIED** at this time, since a federal law claim remains pending in this action.

IT IS FURTHER ORDERED that the Motion to Dismiss of Additional Defendants Blessing Corp.; Tri Cat, Inc.; Dennis Defrange; and Terry Kinyon filed August 6, 1997 (Docket Entry #112) is hereby **DENIED**, at this time.

IT IS SO ORDERED this 26th day of November, 1997,

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 31, 2000]

No. 98-7148

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff-Appellant,

v.

CITY OF MCALESTER, a municipality; THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust; KENNETH W. SHERILL; LINDA F. SHERILL; CITY OF MCALESTER; BAR-19; BLESSINGS CORP., d/b/a Edison Plastics; MIG, INC.; SOUTH-WEST OKLAHOMA BOX COMPANY; TRI-CAT, INC.; SIMMONS POULTRY FARMS, INC.; DENNIS DEFRANGE; TERRY KINYON; PITTSBURG COUNTY REGIONAL

EXPOSITION AUTHORITY; PITTSBURG COUNTY BOARD OF COMMISSIONERS, a/k/a Board of County Commissioners of Pittsburg County, Oklahoma; H.G. GILLIAM; BILL WEBBER; OBEN WEEKS; THUNDER-CREEK GOLF COURSE TRUST AUTHORITY,

Defendants-Appellees.

OKLAHOMA MUNICIPAL LEAGUE; NATIONAL LEAGUE OF CITIES,

Amici Curiae.

ORDER

Before **BALDOCK** and **BRORBY**, Circuit Judges, and **REAVLEY**,[1] Senior Circuit Judge.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is also denied.

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[1] The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Phil Stephens
Deputy Clerk

APPENDIX F

7 U.S.C. § 1926. Water and waste facility loans and grants.

(a) Criteria; definitions; limitation on allowable uses of Federal funds; inclusion of interest or other income in gross income on sale of insured loan

(1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes. The Secretary may also make loans to any borrower to whom a loan has been made under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*), for the conservation, development, use, and control of water, and the installation of drainage or waste disposal facilities, primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of

Title 26. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $590,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area. The Secretary shall fix the grant rate for each project in conformity with regulations issued by the Secretary that shall provide for a graduated scale of grant rates establishing higher rates for projects in communities that have lower community population and income levels.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed, (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a

comprehensive community water, waste disposal, or other development plan of the rural area.

(4)(A) The term "development cost" means the cost of construction of a facility and the land, easements, and rights-of-way, and water rights necessary to the construction and operation of the facility.

(B) The term "project" shall include facilities providing central service or facilities serving individual properties, or both.

(5) Application requirements

Not earlier than 60 days before a preliminary application is filed for a loan under paragraph (1) or a grant under paragraph (2) for a water or waste disposal purpose, a notice of the intent of the applicant to apply for the loan or grant shall be published in a general circulation newspaper. The selection of engineers for a project design shall be done by a request for proposals by the applicant.

(6) The Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to public bodies or such other agencies as the Secretary may determine having authority to prepare comprehensive plans for the development of water or waste disposal systems in rural areas which do not have funds available for immediate undertaking of the preparation of such plan.

(7) Definition of rural and rural areas

For the purpose of water and waste disposal grants and direct and guaranteed loans provided under paragraphs (1) and (2), the terms "rural" and "rural area" mean a city, town, or unincorporated area that has a population of no more than 10,000 inhabitants.

(8) In each instance where the Secretary receives two or more applications for financial assistance for projects that would serve substantially the same group of residents within a single rural area, and one such application is submitted by a city, town, county or other unit of general local government, he shall, in the absence of substantial reasons to the contrary, provide such assistance to such city, town, county or other unit of general local government.

(9) Conformity with State drinking water standards

No Federal funds shall be made available under this section for a water system unless the Secretary determines that the water system will make significant progress toward meeting the standards established under title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f *et seq.*).

(10) Conformity with Federal and State water pollution control standards

No Federal funds shall be made available under this section for a water treatment discharge or waste disposal system unless the Secretary determines that the effluent from

the system conforms with applicable Federal and State water pollution control standards.

The Secretary may make grants, not to exceed $1,500,000 annually, to public bodies, private nonprofit community development corporations or entities, or such other agencies as the Secretary may select to enable the recipients—

(i) to identify and analyze business opportunities, including opportunities in export markets, that will use local rural economic and human resources;

(ii) to identify, train, and provide technical assistance to existing or prospective rural entrepreneurs and managers;

(iii) to establish business support centers and otherwise assist in the creation of new rural businesses, the development of methods of financing local businesses, and the enhancement of the capacity of local individuals and entities to engage in sound economic activities;

(iv) to conduct regional, community, and local economic development planning and coordination, and leadership development; and

(v) to establish centers for training, technology, and trade that will provide training to rural businesses in the utilization of interactive communications technologies to develop international trade opportunities and markets.

(B) Criteria

In awarding the grants, the Secretary shall consider, among other criteria to be established by the Secretary–

(i) the extent to which the applicant provides development services in the rural service area of the applicant; and

The Secretary shall ensure, to the maximum extent practicable, that assistance provided under this paragraph is coordinated with and delivered in cooperation with similar services or assistance provided to rural residents by the Cooperative State Research, Education, and Extension Service or other Federal agencies.

(D) Authorization of appropriations

There are authorized to be appropriated to carry out this paragraph $7,500,000 for each of fiscal years 1996 through 2002.

(12)(A) The Secretary shall, in cooperation with institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307 and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, establish a system for the dissemination of information and technical assistance on federally sponsored or funded programs. The system shall be for the use of institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307, and 308),

or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, and other persons concerned with rural development.

(B) The informational system developed under this paragraph shall contain all pertinent information, including, but not limited to, information contained in the Federal Procurement Data System, Federal Assistance Program Retrieval System, Catalogue of Federal Domestic Assistance, Geographic Distribution of Federal Funds, United States Census, and Code of Federal Regulations.

(C) The Secretary shall obtain from all other Federal departments and agencies comprehensive, relevant, and applicable information on programs under their jurisdiction that are operated in rural areas.

(D) Of the sums authorized to be appropriated to carry out the provisions of this chapter, not more than $1,000,000 per year may be expended to carry out the provisions of this paragraph.

(13) In the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group) in a rural community having a population not in excess of five thousand five hundred and which, in the case of water facility loans, has a community water supply system, where the Secretary determines that due to unanticipated diminution

or deterioration of its water supply, immediate action is needed, or in the case of waste disposal, has a community waste disposal system, where the Secretary determines that due to unanticipated occurrences the system is not adequate to the needs of the community. The Secretary shall utilize the Soil Conservation Service in rendering technical assistance to applicants under this paragraph to the extent he deems appropriate.

(14) Rural water and wastewater technical assistance and training programs

(A) In general

The Secretary may make grants to private nonprofit organizations for the purpose of enabling them to provide to associations described in paragraph (1) of this subsection technical assistance and training to—

(i) identify, and evaluate alternative solutions to, problems relating to the obtaining, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas;

(ii) prepare applications to receive financial assistance for any purpose specified in paragraph (2) of this subsection from any public or private source; and

(iii) improve the operation and maintenance practices at any existing works for the storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas.

(B) Selection priority

In selecting recipients of grants to be made under subparagraph (A), the Secretary shall give priority to private nonprofit organizations that have experience in providing the technical assistance and training described in subparagraph (A) to associations serving rural areas in which residents have low income and in which water supply systems or waste facilities are unhealthful.

(C) Funding

Not less than 1 nor more than 3 percent of any funds appropriated to carry out paragraph (2) of this subsection for any fiscal year shall be reserved for grants under subparagraph (A) unless the applications, qualifying for grants, received by the Secretary from eligible nonprofit organizations for the fiscal year total less than 1 per centum of those funds.

(15) In the case of water and waste disposal facility projects serving more than one separate rural community, the Secretary shall use the median population level and the community income level of all the separate communities to be served in applying the standards specified in paragraph (2) of this subsection and section 1927(a)(3)(A) of this title.

(16) Grants under paragraph (2) of this subsection may be used to pay the local share requirements of another Federal grant-in-aid program to the extent permitted under the law providing for such grant-in-aid program.

(17)(A) In the approval and administration of a loan made under paragraph (1) for a water or waste disposal facility, the Secretary shall consider fully any recommendation made by the loan applicant or borrower concerning the technical design and choice of materials to be used for such facility.

(B) If the Secretary determines that a design or materials, other than those that were recommended, should be used in the water or waste disposal facility, the Secretary shall provide such applicant or borrower with a comprehensive justification for such determination.

(18) In making or insuring loans or making grants under this subsection, the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this chapter.

(19) Community facilities grant program

(A) In general

The Secretary may make grants, in a total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, and federally recognized Indian tribes to provide the Federal share of the cost of developing specific essential community facilities in rural areas.

(B) Federal share

(i) In general

Except as provided in clauses (ii) and (iii), the Secretary shall, by regulation, establish the amount of the Federal share of the cost of the facility under this paragraph.

(ii) Maximum amount

The amount of a grant provided under this paragraph for a facility shall not exceed 75 percent of the cost of developing the facility.

(iii) Graduated scale

The Secretary shall provide for a graduated scale for the amount of the Federal share provided under this paragraph, with higher Federal shares for facilities in communities that have lower community population and income levels, as determined by the Secretary.

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(c) Repealed. Pub. L. 91-606, Title III, § 302(2), Dec. 31, 1970, 84 Stat. 1759

(d) Carryover of unused authorizations for appropriations

Any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year.

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(2)

No. 00-323

In The

Supreme Court of the United States

CITY OF McALESTER, et al.,

Petitioners,

v.

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners

City of McAlester and the McAlester Public Works Authority. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "City of McAlester," and "McAlester" are intended to encompass both Petitioners.

Respondents

Pittsburg County Rural Water District No. 7, referenced herein as "Pitt-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes §1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes §1324.3).

At the district court level, this action involved a number of "additional defendants," which were identified as co-appellees at the court of appeals level. The additional respondents to this proceeding are: Kenneth W. Sherrill, Linda F. Sherrill, Bar-19, Blessing Corp., d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis DeFrange, Terry Kinyon, Pittsburg County Regional Exposition Authority, the Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Chairman Bill Webber, Oben Weeks, and Thundercreek Golf Course Trust Authority. In addition, the Oklahoma Municipal League and the National League of Cities were permitted to participate at the court of appeals level as amicus curiae.

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RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McAlester erroneously lists the U.S. Constitution, Act I §8, cl. 1, (The Spending Clause), as being a constitutional provision involved in this case. McAlester seeks to raise this constitutional argument for the first time within its Petition For Certiorari. However, by failing to raise this issue with the Trial Court and the Tenth Circuit on Appeal, McAlester has waived this constitutional argument. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

RESPONSE TO STATEMENT OF THE CASE

Pitt-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop its water distribution system. Pitt-7 brought this action seeking to enjoin McAlester from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. §1926(b).

Title 7 U.S.C. §1926(b) [hereafter §1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other public body from selling water within the water district's service area during the period of its indebtedness.

This action began in 1997 when Pitt-7 filed its complaint seeking to enjoin McAlester from selling water to various customers (not limited to the Industrial Park) within the "service area" of Pitt-7 and seeking damages for past sales.

Pitt-7 claims an exclusive right to sell to all water customers within its service area pursuant to Title 7 U.S.C. §1926(b).

The Industrial Park and the other customers in dispute were included within Pitt-7's geographical boundaries as established by state law in 1966. Although Pitt-7 has never sold water to the Industrial Park, it has made water service available, and the only reason such sales have not occurred is because no request for water service has been made to Pitt-7.

The question of whether §1926(b) is an exception to the Federal Antitrust Statute or is somehow a violation of The Spending Clause has never been previously raised, or briefed by McAlester. Section 1926(b) prohibits the limitation or curtailment of customer service that is provided or made available by the indebted water district. This restriction is not limited to curtailment or limitation which is accomplished through inclusion of the area served within the boundaries of a municipal corporation or the public body or the grant of any franchise for similar service, but includes curtailment or limitation of any form during the loan period.

On November 26, 1997, the District Court granted summary judgment based on a finding that Pitt-7 had not made service available to the customers in dispute, a

decision which was in error and has been reversed by the Tenth Circuit.

Sequoyah County Rural Water District No. 7 v. Muldrow, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1532, 120 S.Ct. 1548 (2000), is not an announcement of a new liberal interpretation standard for § 1926(b), but is consistent with all courts which have addressed the issue and held that the protection of §1926(b) must be liberally and broadly applied.

The principal error identified by the Tenth Circuit in the District Court's ruling is not that the Court failed to resolve all doubt (all evidentiary uncertainties) in favor of Pitt-7, but that the District Court applied the test to the wrong time, i.e., the District Court applied the test as of *today*, not when the customer first requested or should have requested water service which is the appropriate time to address the issue of whether service is made available.

ARGUMENT FOR DENYING WRIT

The Court should deny McAlester's Petition For Certiorari because McAlester has failed to properly raise any issues of significant importance.

The Tenth Circuit's ruling that §1926(b) must be liberally construed and applied is consistent with every District Court and Circuit Court which have addressed application of the statute.

McAlester's argument is that because McAlester started selling water to the customers in dispute *before*

Pitt-7 brought its claim to stop McAlester, then McAlester should be allowed to continue to violate Pitt-7's §1926(b) rights. This agreement is frivolous.

McAlester's argument that if §1926(b) actually precludes a municipality from selling water to customers within the indebted association's service area, somehow industrial development is derailed or disputed, is without any supported fact. It is ridiculous to contend that a customer, especially an industrial water customer, cares who provides its water, so long as it has an adequate and reliable water supply.

I. THE TENTH CIRCUIT'S INTERPRETATION OF §1926(b) IS CONSISTENT WITH FEDERAL LAW[1]

The Tenth Circuit's determination that doubts about whether a water association is entitled to protection from competition under §1926(b) should be resolved in favor of the Federally indebted party seeking protection for its territory is an appropriate standard. Appellees seek to have this Court review the Tenth Circuit's decision based upon the *new* argument that §1926(b) is an exception to the Federal Antitrust Laws and therefore must be construed narrowly, an argument which McAlester did not make to the Trial Court or the Tenth Circuit on appeal. Because McAlester failed to raise this argument in a

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[1] Although Pitt-7 has set forth its argument in four separate headings, the issue is the same, i.e., whether the Tenth Circuit has issued an opinion which is inconsistent with federal law. However, as discussed below, the Tenth Circuit's decision is consistent with federal law and the decisions of the other Circuit Courts of Appeals.

timely fashion and has thus waived this issue,[2] the Supreme Court should deny the Petition For Certiorari.[3]

The Tenth Circuit's holding that §1926(b) is to be broadly and liberally construed to fulfill its intended purposes is not a new revelation, but is consistent with every Court which has addressed this issue. The Courts have universally held that the purposes of §1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996).

Section 1926(b) furthers its purposes by protecting the territory served by such associations against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [§1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal

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[2] *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

[3] McAlester contends §1926(b) is an exception to the Federal Antitrust Statutes, without providing any facts or arguments to show that the Federal Antitrust Statutes would otherwise be applicable to Pitt-7, a state agency.

> and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed §1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The legislative history of 7 U.S.C. §1926(b) provides additional guidance on the scope of the statutory prohibition. Referring to 1961 revisions in the federal water loan program, the Senate Report explained:
>
> > This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision [section 1926(b)] has

> been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system. S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2309
>
> [2,3] The clear message of the three federal cases applying 7 U.S.C. §1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 424-425 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us

> do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of §1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

In addition, §1926(b) is a statute which was enacted to protect a *"public interest,"* and statutes enacted for such purpose are to be interpreted broadly:

> The doctrine of equitable estoppel, like other principles of equity, will be applied flexibly by a federal court to achieve fairness and avoid injustice. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 104 S.Ct. 2218, 2223, 91 L.Ed.2d 42, 51 (1984). *However, equitable estoppel cannot apply to block the application of a statute enacted to protect the public interest. Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257, 66 S.Ct. 101, 105, 90 L.Ed. 47, 52 (1945).
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> * * *
>
> *The Court finds that the purposes of 7 U.S.C. §1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid both purposes aimed at promoting the public interest – rather than merely to protect the private interest of a rural water association.* See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987); S.Rep. No. 566, 87th Cong., lst Sess. reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309. If Jennings were estopped

from invoking the statute in this action, the result would be that North Vernon would sell water to CSL – a result that would totally violate the statutory proscription of municipal encroachment on a rural water association's service. Thus, even if CSL's allegations about Jennings' conduct are true, because as a matter of law estoppel cannot be invoked to subvert the application of a statute enacted in the public interest, CSL's motion for summary judgment must be denied.

This analysis is consistent with cases holding that a private party may not waive the operation of a statute enacted to benefit the public interest. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 1445, 67 L.Ed.2d 641, 653 (1981); *Brooklyn Savings Bank v. O'Neil*, 325 U.S. 697, 704, 65 S.Ct. 895, 900-01, 89 L.Ed. 1296, 1307 (1945) (*"a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy "*); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 360-61, 64 S.Ct. 128, 130-131, 88 L.Ed. 96, 101 (1943); *Millmaster Int'l, Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A.) ("A party may not waive a right granted to further a legislative policy in the public interest as manifested in the statute or its legislative history if the waiver would thwart the statutory purpose"), modified, 429 F.2d 985 (C.C.P.A. 1970). As noted above, 7 U.S.C. §1926(b) was enacted to benefit the public interest. Therefore, *just as Jennings could not have voluntarily waived the polication of the statute and authorized North Vernon to violate an act of Congress*, the same result cannot be achieved by estoppel. (Emphasis added)

Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F. Supp. 421 (S.D. Ind. 1988), *aff'd;* 895 F.2d 311 (7th Cir. 1989).

In *Midstate Horticultural*, the court was addressing whether a party, by agreement, could waive a three year statute of limitation period provided by the Interstate Commerce Act. The parties, before the statute of limitation had run, entered into a formal written agreement that the Defendant would not raise the defense of statute of limitations should the parties fail to settle their disputes and litigation be subsequently brought. After the running of the statute of limitations, the Plaintiff brought suit and the Defendant asserted the statute of limitation notwithstanding their prior agreement. The Court in that case held that the agreement not to raise the statute of limitations was *"invalid as being contrary to the intent and effect of the section and the Act"*. *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 64 S.Ct. 128, at p. 130, 88 L.Ed. 96 (1943).

In this case (as reflected by the *Jennings* decision) the rights provided by Title 7 U.S.C. §1926(b) are rights granted to Pitt-7 in the public interest and to effectuate a legislative policy to ensure repayment to the FmHA and to ensure rural water customers safe, clean water, and the statute should be read broadly to protect these interests.

Antitrust Legislation is given broad interpretation (and exceptions narrow interpretation) because Antitrust Legislation is *"remedial"*:

> "Because the Act is remedial, it is to be construed broadly to effectuate its purposes".

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12, 96 S.Ct. 1305 (1975).

Section 1926(b), as a "public interest" statute, is likewise *remedial* legislation, which seeks to protect the rural water districts, the customers of the districts, and Federal Government loans, as well as promoting public health and welfare by assuring an adequate, clean water supply for rural residents. Section 1926(b) itself must be construed broadly to effectuate its intended purposes.

CONCLUSION

Based upon the arguments and authorities presented, the Petition should be denied.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Virginia Bankshares, Inc. v. Sandberg,
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Westville Util. Auth. v. Bennett,
903 P.2d 880 (Okla. App. 1995) 1

Federal Statutes

7 U.S.C. § 1926(b) 1, 2

INTRODUCTION

To paraphrase the Oklahoma Court of Civil Appeals, 7 U.S.C. § 1926(b) is not applicable to the Taylor Industrial Park ("Park") because Section 1926(b) requires an encroachment by the municipality into the territory of the rural water district. "If anything, the reverse is true here making [Section 1926(b)] inapplicable." *Westville Util. Auth. v. Bennett*, 903 P.2d 880, 883 (Okla. App. 1995).

In *Westville Utility Authority*, a rural water district claimed an exclusive right to serve water to a laundromat that had been served for many years by the town of Westville through its Utility Authority. The laundromat switched from the town's water service to rural water district service in April 1992. When the town of Westville challenged the rural water district's actions, the Oklahoma Court of Civil Appeals flatly rejected the rural water district's claim of an exclusive right to serve the laundromat. The federal anticompetitive protection claimed by the rural water district, based on 7 U.S.C. § 1926(b), did not apply because the statute was intended to protect against encroachment by a municipality into a rural water district's service area. Section 1926(b) was not intended to *support* a rural water district's effort to encroach on the service area of a municipality.

In this case, Pittsburg has attempted to wrest control of water services to the Park by urging an overly broad application of Section 1926(b). As demonstrated by McAlester's Petition for Writ of Certiorari, the overly broad application of Section 1926(b) urged by Pittsburg is contrary to federal law of statutory interpretation.

Pittsburg has never served water to the Park. Pittsburg owes no duty to serve the disputed customers. In fact, Pittsburg likely has no intention of ever serving the disputed customers. If Pittsburg is granted an exclusive right to serve the disputed customers, these customers would likely be forced to build additional water lines and facilities so that Pittsburg could provide water service. The result is economic waste: McAlester already provides water service to the disputed customers, and has done so since before Pittsburg was indebted to the federal government. Pittsburg hopes that it can use federal-court judgments enforcing this economic waste to force McAlester to buy Pittsburg's right to serve the disputed customers. This inequitable result is not what the framers of Section 1926(b) intended.

ARGUMENT

The issue of whether 7 U.S.C. § 1926(b) should be construed narrowly or broadly was pressed and passed upon in the district court and the Tenth Circuit.

The most significant flaw in Pittsburg's Response is its claim that McAlester waived its claims regarding the constitutionality of Section 1926(b). McAlester has consistently argued throughout this litigation that Section 1926(b) should be applied narrowly, and that Pittsburg's suggested rules for application of Section 1926(b) were far too broad. Throughout this litigation, both sides have advanced alternative methods of interpreting Section 1926(b). Pittsburg urged extreme methods of applying the anticompetitive protection found in Section 1926(b) – methods that are even more extreme than the broad interpretation adopted by the Tenth Circuit. The briefing cycle in the Tenth

Circuit proceedings in this case was complete when the Tenth Circuit announced its decision in *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000).

The specific interpretation arguments contained in McAlester's Petition for Writ of Certiorari were also contained in McAlester's Petition for Rehearing to the Tenth Circuit. Those arguments were rejected by the Tenth Circuit when that Court overruled the Petition for Rehearing on May 31, 2000.

McAlester's argument that the Tenth Circuit's broad application of Section 1926(b) is constitutionally infirm is simply an extension of McAlester's consistent argument that Section 1926(b) must be construed narrowly. The new aspects of McAlester's argument were necessitated by the Tenth Circuit's decision, applying Section 1926(b) much more broadly than prior courts.

The Supreme Court's decisions have recognized the Court's power to consider pertinent arguments on federal claims that are properly presented. *Lebron v. National Rr. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). The Court's "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (internal quotations omitted; citations omitted).

McAlester's position that the Tenth Circuit's interpretation of Section 1926(b) is inconsistent with congressional power and federal antitrust laws is not a new claim. At worst, McAlester's argument on congressional

power and federal antitrust laws is a new argument to support McAlester's consistent claim: that Section 1926(b) should be construed narrowly to allow McAlester to serve water to its current customers. Furthermore, the Tenth Circuit's interpretation of Section 1926(b) is based on a newly announced liberal-interpretation standard. As a result, any arguments against the new standard would by definition be new arguments.

Finally, contrary to Pittsburg's assertion,[1] the standard for interpretation of Section 1926(b) is a question that was squarely and principally addressed by both the District Court

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[1] Pittsburg suggests that the Tenth Circuit's broad standard for interpretation of Section 1926(b) was secondary to a timing issue. [Pittsburg's Response, at p. 3.] The Tenth Circuit rested its decision squarely on the broad standard, ruling that "the district court applied the wrong standard to determine whether the District made service available to the disputed customers." [Appendix A, at p. 11a.] Pittsburg is disingenuous when it suggests that the Tenth Circuit rested its decision on a rule that Section 1926(b) analysis should be applied "when the customer first requested or should have requested water service which is the appropriate time to address the issue of whether service is made available." [Pittsburg's Response, at p. 3.] The Tenth Circuit's treatment of the timing issue on pages 11a and 12a of Appendix A shows that Pittsburg's description has skewed the Tenth Circuit's decision, inserting a confused view in an apparent effort to influence future judicial statements of the rules discussed by the Tenth Circuit. The Tenth Circuit recognized that the pipes-in-the-ground test must consider whether the rural water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made. [Appendix A, at p. 12a.] The Tenth Circuit did not hold that the District Court must determine when a request was first made, or when a request should first have been made, as suggested by Pittsburg.

and the Tenth Circuit. [Appendix A, at p. 11a; Appendix B, at pp. 24a-26a, 30a-31a.]

The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Lebron*, 513 U.S. at 379. That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41; *see also Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

This rule is sensible in this case because the Tenth Circuit has adopted a new rule of construction that will govern all future cases in its jurisdiction involving Section 1926(b). A court's resolution of an issue of law is fairly presented for review, whether or not it was pressed by a party. There can be no doubt that in this case, the Tenth Circuit has announced a new and broad standard of construction for Section 1926(b). If allowed to stand, the Tenth Circuit's new standard for construction of Section 1926(b) will bind courts in all Section 1926(b) litigation in the Tenth Circuit. Furthermore, an appropriate review of the Tenth Circuit's new standard for construction of Section 1926(b) necessarily entails an analysis of the constitutional limitations on interpretation of the statute, as well as possible conflicts between the new standard and federal antitrust laws.

The Court has long applied the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also Allentown Mack Sales & Serv., Inc. v. National Labor Relations Bd.*, 118 S. Ct. 818, 833 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (relying on *Edward J. DeBartolo Corp.*). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

In reviewing the Tenth Circuit's new liberal-interpretation standard for Section 1926(b), the Court would be obliged to consider whether the Tenth Circuit's interpretation is consistent with the Spending Clause power with which Congress enacted Section 1926(b). The Court should assume that Congress did not intend to exceed the scope of its Spending Clause power. The Court should also assume that Congress did not intend to facilitate an unconstitutional taking of municipally-owned infrastructure by enacting Section 1926(b). For these reasons the Tenth Circuit's interpretation of Section 1926(b) raises serious constitutional problems. The more appropriate interpretation of Section 1926(b), urged by McAlester in its Petition for Writ of Certiorari, would avoid these constitutional problems.

Furthermore, to the extent that it is necessary to determine congressional intent in interpreting Section 1926(b), the Court must consider federal case law requiring narrow construction of statutes that provide exceptions to federal antitrust laws. In interpreting federal statutes, the Court assumes that when it passes legislation, Congress is

aware of existing law, including basic rules of statutory construction. *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 801 (1998); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Thus, the Court should assume that Congress was aware that an antitrust safe harbor such as Section 1926(b) would be construed narrowly, as required by this Court's decisions, including *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983). The Court should assume that Congress intended Section 1926(b) to be interpreted in a manner consistent with such decisions.[2]

When the Court is presented with a claim that involves a federal statute, issues of statutory interpretation should never be outside the Court's reach. Pittsburg's argument to the contrary should be rejected.

CONCLUSION

Pittsburg is incorrect in its argument that McAlester has waived its statutory-construction arguments. The interpretation of Section 1926(b), and the standard for its interpretation, have been "pressed and passed upon." McAlester should not be limited to the precise arguments that it raised before the new liberal standard was pronounced by the Tenth Circuit on evidentiary issues affecting statutory interpretation. More importantly, Pittsburg has failed to

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[2] Pittsburg's response to this issue includes a lengthy discourse on waiver of public rights. [Response, at pp. 8-10.] Pittsburg's argument on waiver of public rights is impertinent to McAlester's argument that Section 1926(b) should be interpreted narrowly because it is an exception to federal antitrust laws.

demonstrate that the Tenth Circuit's liberal interpretation of Section 1926(b) can be reconciled with federal antitrust laws and constitutional constraints on congressional power. The construction advanced by McAlester in this case is more reasonable, more consistent with the text of the statute, and avoids the constitutional problems identified in the Petition for Writ of Certiorari.

/s/_____
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